

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD
Cr. Appeal No.D-90 of 2014

PRESENT

Mr. Justice Naimatullah Phulpoto
Mr. Justice Zulfiqar Ahmad Khan.

Date of Hearing: 07.04.2017
Date of Judgment: 07.04.2017
Appellant/accused: Through Mr. Ghulam Nabi Jarwar,
Advocate
The State: Through Syed Meeral Shah Bukhari,
Deputy Prosecutor General, Sindh.

JUDGMENT

NAIMATULLAH PHULPOTO, J:- Appellant Shahid was tried by learned Special Judge (CNS), Sanghar in Special Case No.76 of 2011 for the offence under Section 9(b) Control of Narcotic Substances Act, 1997. By judgment dated 16.08.2014, 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.10,000/-, in default thereof the appellant shall suffer S.I for 30 days more. Benefit of Section 382(B) Cr.P.C was extended to the appellant/accused.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 09.12.2011 SIP Abdul Majeed Nizamani of Police Station Shahdadpur left Police Station alongwith his subordinate staff vide roznamcha entry No.20 at 1815 hours for patrolling duty. While patrolling at various places, when police party reached at Mai Sohni Graveyard near Shahdadpur, it is alleged that SHO

received spy information that one person was selling charas at the graveyard. Police party proceeded there and reached there at 1930 hours. Police party saw that the present accused was standing there, he had a plastic bag in his hand. Accused while seeing the police party tried to slip away but he was surrounded and caught-hold and a shopper was recovered from his possession. On inquiry, the accused disclosed his name as Shahid S/o Gul Muhammad Kaloi. From his personal search cash of Rs.50/- was recovered from his front pocket. Plastic bag was opened by the SHO in presence of the mashirs P.Cs Ali Gul and Aurangzeb; it contained 10 small and big pieces of charas; charas was weighed; it was 240 grams, out of it 10 grams were separated as a sample for sending to the chemical analyzer. Thereafter, sample and the remaining charas were separately sealed at spot. Accused was arrested in presence of mashirs. Mashirnama of arrest and recovery was prepared. Thereafter, the accused and case property were brought to the Police Station, where FIR was registered against the accused on behalf of the State by SHO, it was recorded vide Crime No.349/2011 for offence under Section 9(b) Control of Narcotic Substances Act, 1997.

3. During the investigation, the Investigating Officer visited place of wardat, recorded 161 Cr.P.C statement of P.Ws and dispatched 10 grams as a sample to the chemical examiner on 13.12.2011. Positive chemical report was received. On completion

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

4. Trial Court framed the charge against the accused under Section 9(b) of CNS Act, 1997 at Ex-2. Accused pleaded not guilty and claimed to be tried.

5. In order to prove its, the prosecution examined P.W-1 SIP Abdul Majeed Nizamani at Ex-3, who produced attested copies of roznamcha entries No.20 & 23 at Ex-3/A, memo of arrest and recovery at Ex-3/B and FIR at Ex-3/C. P.W-2 Mashir P.C Ali Gul was examined at Ex-4. P.W-3 SIP Dodo Khan Junejo, Investigating Officer, was examined at Ex-5, who produced positive report of chemical examiner at Ex-5/A. Thereafter, the prosecution side was closed vide statement at Ex-6.

6. Statement of accused under Section was recorded under Section 342 Cr.P.C at Ex-7, in which the accused claimed his false implication in this case and denied the recovery of the charas from his possession. Accused raised plea that the prosecution witnesses have deposed against him in order to show their efficiency before superiors. Accused declined to give statement on oath in disproof of the prosecution allegations. No evidence has been led by the accused in his defence.

7. Learned Trial Court after hearing the learned Counsel for the parties and examining the evidence available on record,

convicted and sentenced the accused as stated above. Hence, this appeal.

8. 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 16.08.2014, therefore, the same may not be reproduced here, so as to avoid duplication and unnecessary repetition.

9. Mr. Ghulam Nabi Jarwar, learned Advocate for the appellant mainly contended that it was the case of spy information; SHO had sufficient time to associate with him independent persons of the locality to witness the recovery proceedings but SHO deliberately avoided it. He has pointed out that there is major contradiction in prosecution evidence with regard to the number of pieces of the charas recovered from the possession of the accused. Learned Counsel for the appellant has further argued that in the mashirnama of arrest and recovery, it is mentioned that 10 pieces of charas were recovered from the shopper of the accused but before the Trial Court case property was de-sealed and there were 16 pieces of the charas. Learned Advocate for the appellant argued that according to the prosecution case, charas was recovered from the possession of the accused on 09.12.2011 but it was sent to the chemical examiner for analysis on 13.12.2011 and the delay in sending of the charas has not been plausibly explained by the prosecution. It is further argued that none of the prosecution witnesses has deposed that who had taken the sample to the

chemical examiner and there was no evidence that the charas was in safe custody for the period of four days. Learned Advocate for the appellant lastly argued that there was tampering in the case property. It is submitted that the prosecution case was highly doubtful. In support of his contentions, learned Counsel for the appellant has relied upon the cases of *PERVEZ ALIAS GIDARI V/S. THE STATE (2013 P.Cr.L.J 635)*, *MAULA JAN V/S. THE STATE (2014 SCMR 862)*, *MUHAMMAD SALEH MALLAH V/S. THE STATE (2016 P.Cr.L.J 432)* and *MUHAMMAD ABBAS V/S. THE STATE (2008 Cr.L.J 26)*.

10. Syed Meeral Shah Bukhari, learned D.P.G conceded to the contention of the defence Counsel and submitted that it is mentioned in the mashirnama of arrest and recovery that 10 small and big pieces of the charas were recovered from the possession of the accused but before the Trial Court 16 pieces of the charas were produced. It has also been admitted by learned D.P.G that there is nothing on the record that who had taken the sample of the charas to the chemical examiner. Learned D.P.G did not support the judgment of the Trial Court.

11. We have carefully heard learned Counsel for the parties and scanned the entire evidence. We have come to the conclusion that the prosecution has failed to prove its case against the appellant for the reasons that according to the mashirnama, 10 small and big pieces of the charas, weighing 240 grams, were recovered from the shopping bag of the accused but before the

Trial Court, 16 small and big pieces of the charas were produced. No explanation has been furnished by the prosecution to resolve this ambiguity. There is also contradiction in the evidence of the complainant and mashir with regard to the route adopted by the police party for reaching to the place of recovery. From perusal of the evidence, it transpired that no prosecution witness has deposed that who had taken the sample of the charas to the chemical examiner. There was no evidence on the record that the charas was in safe custody for four days in *Malkhana* of the Police Station. In this respect, rightly reliance has been placed upon the case of *Muhammad Abbas v. The State* reported in 2008 Cr.L.J 26.

Relevant portion is reproduced as under:-

“After hearing the learned counsel for the parties and going through the record we have straightaway observed that although the alleged recovery of narcotic substance from the appellant’s possession had been affected on 29.6.1998 yet none of the prosecution witnesses had uttered even a single word as to what had happened to the recovered substance after its recovery and with whom the same had been deposited for safe custody. It was only Muhammad Ramzan, FC (PW4) who had stated before the learned Trial Court that on 13.7.1998 he had been handed over two parcels said to contain heroin and Charas by Moharir Head Constable of the relevant Police Station for onward transmission to the office of the Chemical Examiner which he delivered there on the same day. The report of the Chemical Examiner (Exhibit-PE), however, shows that the docket of the samples of the recovered substance had been prepared on 6.7.1998 and the said samples had been dispatched by the Excise & Taxation Officer, Sheikhpura and not by the local police. We have required the learned counsel for the State to explain as to who the samples of the recovered substance had come in the hands of the Excise & Taxation Officer, Sheikhpura and what was the evidence available on the record to confirm that the same had been kept in safe custody while in possession of the Excise & Taxation Officer,

Sheikhupura but after going through the record of the case from cover to cover he has categorically conceded that there is no evidence whatsoever available on the record in those respects. In such a state of the evidence available on the record safe custody of the recovered substance or its samples is not discernable from the record of this case and, thus, we have found it to be extremely unsafe to uphold and maintain the appellant's convictions and sentences recorded by the learned Trial Court. This appeal is, therefore, allowed, the convictions and sentences of the appellant recorded by the learned Trial Court are set aside and he is acquitted of the charge by extending the benefit of doubt to him. He shall be released from the jail forthwith if not required in any other case."

12. We have come to conclusion that prosecution has failed to establish its case against the appellant beyond shadow of doubt for the reasons that there are major contradictions in the evidence of the prosecution with regard to the route adopted by the Police for patrolling and number of the pieces of the charas recovered from the possession of the accused. Safe custody of the charas at *Malkhana* was also not established. In such circumstances, it would be unsafe to rely upon the evidence of the police officials without independent corroboration, which is lacking in this case. There are several circumstances in this case, which create doubt in the prosecution case. Reliance has been placed upon the case of *Khalil Ahmed V/s. The State (PLD 2008 Karachi 8)*, in which it is held as under:-

"18. In the circumstances, the case of the prosecution is highly doubtful. The conviction cannot be based on such type of trials which are marred by glaring infirmities. However, the trial Court resolved all the doubts in favour of prosecution and convicted the appellant, while losing sight of well-entrenched principle of law, that the burden was always on the prosecution to prove the charge beyond all reasonable doubts. The

rule adopted by the trial Court, to say the least was not conducive for the safe administration of justice.

19. So far as the order of confiscation of the vehicle is concerned, it was made without availability of any material on the record. It was mechanically passed in flagrant violation of the provisions of section 33 of the Control of Narcotic Substances Act, as such the mandate of law was flouted by the trial Court. Thus the order of confiscation is nullity, the same deserves to be struck down.”

13. It is high time for the Courts to ensure that proceedings of the recovery and seizure in the Narcotic cases are made in the most transparent and confidence inspiring manner so as to protect innocent citizens from the highhandedness of the Police and to save them from agony of uncalled for trials. Learned Counsel has rightly relied upon the case of *Khalil Ahmed v. the State (PLD 2008 Karachi 8)*. We have come to conclusion that prosecution case is highly doubtful and extend benefit of doubt to accused.

14. For the above reasons, appeal is allowed, impugned judgment dated 16.08.2014 is set aside and the appellant is acquitted of the charge. He is present on bail, his bail bond stands cancelled and surety is hereby discharged.

JUDGE

JUDGE

