

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Appeal No.D-340 of 2010

PRESENT

Mr. Justice Naimatullah Phulpoto

Mr. Justice Zulfiqar Ahmad Khan

Date of Hearing: 13.04.2017

Date of Judgment: 13.04.2017

Appellant/accused: *Mst. Fareeda D/o Hussain Bux,
through M/s. Mir Ahmed Mangrio and
K.B Lutuf Ali Laghari, Advocates*

The State *Through Mr. Amjad Ali Sahito, Special
Prosecutor ANF.*

JUDGMENT

NAIMATULLAH PHULPOTO, J:- Appellant Mst. Fareeda W/o Ashique Ali was tried alongwith co-accused Allah Bachayo (since acquitted) by learned Sessions Judge/Special Judge (CNS), Jamshoro at Kotri in Special Case No.21 of 2008 for the offence under Section 9(c) Control of Narcotic Substances Act, 1997. By judgment dated 18.09.2010, the appellant was convicted under Section 9(c) Control of Narcotic Substances Act, 1997 and sentenced to 03 years and to pay a fine of Rs.30,000/-, in case of default in payment of fine, the appellant was ordered to suffer R.I for 06 months more. Benefit of Section 382(B) Cr.P.C was extended to the appellant. However, accused Allah Bachayo was acquitted of the charge by extending the benefit of doubt.

2. Brief facts of the prosecution case as deposed by Ghulam Murtaza, SHO P.S ANF, Hyderabad are that on

17.08.2008 he was posted at P.S ANF, Hyderabad. On the same date he left alongwith SIP Muhammad Muzamil, ASI Mujtaba Mehdi, HC Raheem Bux and PC Abdul Razzaque including lady searcher namely Hameeda for patrolling duty at 1530 hours. When they reached near bridge of Sehwan Town, he received spy information that Allah Bachayo Solangi alongwith his niece Fareeda Solangi (present appellant) were selling charas in front of house in village Gul Muhammad Shah. On such information, ANF officials proceeded to the pointed place, where they saw both the accused present there. It is alleged that they had black shopper in their hands. It is stated that accused Allah Bachayo, while seeing the police party, threw his shopper and made his escape good. However, Mst.Fareeda was surrounded and caught-hold. On the inquiry, she disclosed her name as Mst.Fareeda W/o Ashique Solangi. Plastic bag recovered from her possession was opened in presence of mashirs; it contained small pieces of charas weighing 125 grams. Plastic bag, which was thrown by accused Allah Bachayo, was opened; it contained small pieces of the charas. Charas was weighed, it came 1 K.G and 5 grams, out of which, 10 grams of charas were separated for sending to the chemical examiner for analysis. One black coloured purse was also recovered, from which cash of Rs.120 and NIC in the name of Mst.Husna were secured. On the inquiry, Mst.Fareeda disclosed the name of co-accused as Allah Bachayo. SHO prepared mashirnama of arrest and recovery of Mst.Fareeda in presence of mashirs PC Mujtaba Mehdi and lady searcher Mst.Hameeda.

Thereafter, the case property was sealed at spot. Accused and case property were brought to the Police Station. FIR was lodged against the accused vide Crime No.07 of 2008 for offence under Section 9(c) of Control of Narcotic Substances Act, 1997.

3. During the investigation, 161 Cr.P.C statement of P.Ws were recorded. Sample of the charas was sent to chemical examiner for analysis. Positive chemical report was received. Subsequently, accused Allah Bachayo was arrested. On the conclusion of investigation, challan was submitted against both the accused under Section 9(c) Control of Narcotic Substances 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. In order to prove its case, prosecution examined P.W-1 SHO Ghulam Murtaza at Ex-6, who produced mashirnama of arrest and recovery, roznamcha entry No.8, FIR, criminal record of accused Allah Bachayo, letter for sending sample and chemical examiner's report at Ex-6/A to 6-E. P.W-2 Muhammad Muzamil at Ex-7. Thereafter, the prosecution side was closed vide statement at Ex-8.

6. Statements of accused was recorded under Section 342 Cr.P.C at Exs-9 and 10. Both the accused pleaded not guilty and claimed to be tried. Both the accused claimed false implication

in this case and stated that P.Ws have deposed against them falsely. Both the accused declined to give statement on oath in disproof of the prosecution allegations. No evidence has been led by the accused in their defence.

7. Learned Trial Court after hearing the learned Counsel for the parties and on assessment of the evidence, convicted Mst.Fareeda under Section 9(b) Control of Narcotic Substances Act, 1997 and sentenced her to 03 years and to pay a fine of Rs.30,000/-, in case of default in payment of fine, she was ordered to suffer R.I for 06 months more. However, benefit of Section 382(B) Cr.P.C was extended to her. Co-accused Allah Bachayo by extending benefit of doubt was acquitted of the charge. Mst.Fareeda has filed instant appeal against the aforesaid judgment passed by the Trial Court.

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 18.09.2010, therefore, the same may not be reproduced here, so as to avoid duplication and un-necessary repetition.

9. Learned Advocate for the appellant mainly contended that the prosecution case was highly doubtful. On the same set of evidence, co-accused Allah Bachayo, who allegedly threw away the shopper containing 1005 grams of charas, has been acquitted by the Trial Court but the evidence regarding Mst.Fareeda has not been appreciated according to the settled principles of law. It is

also argued that the Deputy Director being senior officer and head of the ANF officials has not been examined by the prosecution and it has created doubt in the prosecution case. It is also contended that the lady searcher namely Mst.Hameeda has also not been examined by the prosecution. It is also argued that none of the prosecution witnesses has deposed that after recovery of the charas from the possession of appellant, it was kept in safe custody and it was safely dispatched to the chemical examiner. It is submitted that the charas has been foisted upon the lady accused as the persons of the locality had protested against the highhandedness of ANF officials. Such news items were published in the newspaper.

10. Mr. Amjad Ali Sahito, learned Special Prosecutor ANF argued that the prosecution has proved its case and the Trial Court for the valid reasons convicted Mst.Fareeda and acquitted the co-accused Allah Bachayo. He has argued that non-examination of Deputy Director and mashir lady Mst.Hameed would not be fatal to the prosecution case. He has supported the case of the prosecution and prayed for dismissal of the appeal.

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

12. From the perusal of the record, it transpired that it was the case of spy information. SHO Ghulam Murtaza had sufficient time to call villagers from place of recovery for making as mashir to witness the recovery proceedings but it was not done by him for the

reasons best known to him. It is also matter of the record that SHO Ghulam Murtaza had left the Police Station alongwith his subordinate staff headed by Tajmeen Ali Khan, Deputy Director ANF but the Deputy Director has not been examined by the prosecution. As such, material evidence of Deputy Director ANF was withheld. Evidence shows that a large number of police officers had surrounded appellant Mst.Fareeda and co-accused Allah Bachayo but it is unbelievable that co-accused Allah Bachayo ran away from the police party. SIP Muhammad Muzamil has admitted that the private persons were present at the spot at the time of recovery of charas from the accused but they were not made as mashirs in this case. Personal search of Mst.Fareeda was conducted by lady searcher Mst.Hameeda and she had signed the mashirnama of arrest and recovery but she has not been examined by the prosecution at the trial. Non-examination of lady searcher mashir would be beneficial circumstance for appellant Mst.Fareeda. According to the case of the prosecution, charas was recovered from the possession of appellant Mst.Fareeda on 17.08.2008 and it was sent to the chemical examiner through P.C Wilayat Ali, but he has not been examined by the prosecution. Not a single prosecution witness has deposed that after recovery of the charas from the possession of the appellant, it was kept in safe custody and it was safely transmitted to the chemical examiner. This has also created serious doubts in the prosecution case. On this point, the Honourable Supreme Court in the case of

IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002),

has held 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.”

13. 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 witnesses. Lady mashir and Deputy Director ANF have not been examined by the prosecution at trial. Safe custody of the charas at *Malkhana* 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.”

14. It is also well settled law that 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/S. THE STATE (1995 SCMR 1345)*.

15. For the above reasons, appeal is allowed, impugned judgment dated 18.09.2010 is set aside and the appellant is acquitted of the charge. Appellant is on bail but not present as the learned Counsel for appellant submits that he could not inform her about today's date of hearing. Her bail bond stands cancelled and surety is discharged. These are the reasons for our short order dated 13.04.2017 announced in open Court.

JUDGE

JUDGE

Shahid