

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Appeal No.D-28 of 2016

PRESENT

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

Date of Hearing: 24.04.2017

Date of Judgment: 24.04.2017

*Appellant/accused: Shoukat Ali Brohi S/o Rasool Bux @
Rasoolo: Through Syed Roshan Ali
Shah, Advocate*

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

JUDGMENT

NAIMATULLAH PHULPOTO, J:- This Criminal Appeal is directed against the judgment dated 11.03.2016 passed by learned Special Judge (NARCOTICS), Shaheed Benazirabad Special Case No.132 of 2013 arising out of Crime No.03 of 2013 for offence under Section 9(c) Control of Narcotic Substances Act, 1997, whereby the learned Judge convicted appellant Shoukat Ali Brohi for offence under Section 9(c) Control of Narcotic Substances Act, 1997 and sentenced to 04 years and 06 months R.I and to pay a fine of Rs.20,000/-, in case of default in payment of fine, to suffer S.I for 05 months more. Benefit of Section 382(B) Cr.P.C was extended to the appellant.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 25.02.2013 at 1335 hours, SIP Sabir Hussain of P.S Dour left police station alongwith his subordinate staff vide roznamcha entry No.11 for patrolling duty. When the police party reached at graveyard of Dargah Jalal Pir, they saw the present accused standing on the road, who while seeing the police mobile tried to slip away as the accused was in a suspicious manner, he was stopped by the police officials. Due to the non-availability of the private persons, SHO made P.Cs Akbar Ali and Hakim Ali as mashirs. On inquiry, the accused disclosed his name as Shoukat Ali S/o Rasool Bux alias Rasoolo Brohi. His personal search was conducted in presence of the mashirs. During search, three pieces of the charas were recovered from his possession. Charas was weighed, which became 1100 grams, out of which, 200 grams were separated as a sample for sending to the Chemical Examiner for analysis; the remaining 900 grams of charas were also separately sealed. Cash of Rs.130/- was also recovered from the front pocket of the accused. Mashirnama of arrest and recovery was prepared in presence of the mashirs. Thereafter, the accused and case property were brought to the police station, where FIR was lodged against the accused on behalf of the State vide Crime No.03 of 2013 for offence under Section 9(c) 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

for analysis. On completion of the investigation, final report was submitted against the accused under Section 9(c) Control of Narcotic Substances Act, 1997.

4. Learned trial Court framed the charge against the accused under Section 9(c) Control of Narcotic Substances Act, 1997, in which the accused denied the allegations of the prosecution and claimed to be tried.

5. In order to prove its case, the prosecution examined P.W-1 SIP Sabir Hussain at Ex-8, who produced mashirnama of arrest and recovery at Ex-8/A, FIR at Ex-8/B, arrival and departure entries at Ex-8/C-1 and 8/C-2 and chemical examiner's report at Ex-8/D. P.W-2/mashir PC Ali Akbar was also examined at Ex-9. Thereafter, the prosecution side was closed.

6. After closure of the prosecution side, statement of accused was recorded under Section 342 Cr.P.C at Ex-11, wherein he denied the allegations of the prosecution and raised the plea that he has been implicated falsely on account of his political views. Accused did not lead any evidence in defence and also declined to examine himself on oath in disproof of the prosecution allegations.

7. Learned Trial Court after hearing the learned Counsel for the parties and on the basis of the evidence adduced by the prosecution, convicted the appellant under Section 9(c) Control of

Narcotic Substances Act, 1997 and sentenced as referred to above.

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 11.03.2016, therefore, the same may not be reproduced here, so as to avoid duplication and unnecessary repetition.

9. Syed Roshan Ali Shah, learned Advocate for the appellant has mainly contended that the prosecution has failed to prove its case against the appellant. It is also contended that according to the case of the prosecution, three pieces of the charas were recovered from the possession of the accused but there is nothing on the record that the samples were drawn from each piece/rod of charas for sending to the Chemical Examiner for analysis. It is also contended that according to the case of the prosecution, the charas was recovered from the possession of the accused at the graveyard of Dargah Jalal Pir but no private person, even Mutawali of Dargah Jalal Pir was examined by the prosecution. Accused has raised a specific plea that he has been involved in this case falsely. In support of his contentions, learned Advocate for the appellant has placed reliance upon the case of *MUHAMMAD HASHIM V/S. THE STATE (PLD 2004 SC 856)*. Learned D.P.G supported the case of the prosecution and he could not satisfy whether the samples were drawn from each piece/rod of

the charas and if so how much quantity was taken from each piece/rod.

10. We have carefully heard learned Counsel for the parties and scanned the evidence available on the record. We have come to the conclusion that there are material contradictions in the prosecution case. P.W-1 SIP Sabir Hussain has deposed that the efforts were made to call the private persons to witness the recovery proceedings but none was available at the spot, even the SIP did not made *Mutawali* of Dargah Jalal Pir to act as mashir. On the same point, the evidence of mashir is contradictory. SIP Sabir Hussain has deposed that pieces of the charas recovered from the possession of the accused were of equal size but in the cross-examination, he replied that the property produced before the Court shows that pieces of the charas were of different sizes. We have noticed overwriting in the roznamcha entry No.11 dated 25.02.2013 but there is no explanation for such overwriting and tampering with the mashirnama of arrest and recovery.

11. It is well established principle of law that burden is on the prosecution to prove its charge beyond any reasonable doubt. Accused has raised a specific plea in his statement recorded under Section 342 Cr.P.C that he is worker of STP and due to political differences, he has been falsely implicated in this case. Since serious doubts have been created in the case of the prosecution, we are unable 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.”

12. 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)*.

13. For the above reasons, we have come to the conclusion that the prosecution has failed to prove its case against the appellant beyond reasonable doubt. Consequently, the appeal was allowed, impugned judgment dated 11.03.2016 was set aside and the appellant was acquitted of the charge as well as the appellant was ordered to be released forthwith if not required in any other case vide our short order dated 24.04.2017. These are the reasons for our said short order.

JUDGE

JUDGE

Shahid