

IN THE HIGH COURT OF SINDH, CIRCUIT COURT,
HYDERABAD.

Cr. Appeal No. D — 17 of 2006.

PRESENT

Mr. Justice Naimatullah Phulpoto

Mr. Justice Rasheed Ahmed Soomro.

Appellants: 1. Muneer Ahmed s/o Muhammad Yousuf.
2. Rajib Ali s/o of Muhammad Saffar.
3. Muhammad Ameen s/o Muhammad Youusif.
Through Mr. Nazeer Ahmed Bhatti, Advocate.

The State : Through Syed Meeral Shah Bukhari, D.P.G.

Date of Hearing: 06.03.2017

Date of Judgment: 06.03.2017.

J U D G M E N T

NAIMATULLAH PHULPOTO, J. Appellants Muneer Ahmed, Rajib Ali and Muhammad Ameen were tried by learned Special Judge (Control of Narcotic Substance) Dadu, in Special Case No.128 of 2005, for offence under section 9(b) Control of Narcotic Substance Act 1997. Appellants were found guilty vide Judgment dated 30.01.2006 and were convicted under section 9(b) Control of Narcotic Substance Act 1997, and sentenced to 03 years R.I. and to pay fine of Rs.25000/- each. In case of the default in payment of the fine they were ordered to suffer R.I. for 03 months. Appellants were extended benefit of Section 382-B Cr.P.C. The appellants, filed aforesaid appeal against their conviction and sentence.

2. Brief facts of the prosecution case as disclosed in F.I.R. are that ASI Dinal Ali Paryo of Police Station Johi, left Police Station pm 4.5.2005 along with ASI Mazhar Ali, H.C. Qamaruddin, P.Cs. Manzoor Ali and Ghulam Asghar in the Government vehicle vide 'roznamcha' entry no.14 at 5-45 p.m. for patrolling duty. While patrolling at various places it is

alleged that when police party reached at Johi Chowk, ASI Dinal Ali received spy information that present accused were standing at Thaheem Mohallah. Pursuant to the spy information, police party proceeded to the pointed place where they saw the present accused persons. Accused while seeing the police mobile tried to run away but police party surrounded and caught hold them. Police enquired the names of accused, to which they disclosed their names as (i) Muneer Ahmed s/o Muhammad Yousuf, (ii) Rajib Ali s/o of Muhammad Saffar and (iii) Muhammad Ameen s/o Muhammad Youusif. ASI Dinal Ali Paryo conducted personal search of the accused persons in presence of mashirs. From the personal search of accused Muneer Ahmed it is alleged that 06 pieces of charas were recovered, from accused Rajib Ali 05 pieces of charas were recovered, from the personal search of accused Muhammad Ameen 06 pieces of charas were recovered in presence of Mashirs namely H.C. Qamaruddin and ASI Mazhar Ali. ASI took two pieces of the charas from the pieces of charas recovered from accused Muneer Ahmed for sending to the Chemical Examiner. One piece was taken from the charas recovered from each accused Rajib Ali and Muhammad Ameen. Thereafter, Mashirnama of arrest and recovery was prepared, samples were separately sealed for sending to the Chemical Examiner. Thereafter, all the three accused and the case property were brought to the Police Station where F.I.R. was lodged against the accused on behalf of State vide crime No. 28 of 2005, for offence under section 9(b) Control of Narcotic Substance Act 1997.

3. During investigation 161 Cr.P.C. statements of P.Ws were recorded, samples were sent to the Chemical Examiner for analysis. Positive chemical report was received. On the conclusion of the investigation, final report was submitted against the accused for offence under section 9(b) Control of Narcotic Substance Act 1997.

4. Trial Court framed 'charge' against the accused under section 9(b) Control of Narcotic Substance Act 1997, on 16.08.2005 at Ex.2. All the

three accused persons did not plead guilty to the charge and claimed to be tried.

5. The prosecution at the trial, produced P.W.1 ASI Dinal Ali (complainant) at Ex.6, P.W.2 H.C. Qamaruddin at Ex.7 and P.W.3 S.H.O. Abdul Majid at Ex.8. Thereafter, prosecution side was closed at Ex.09.

6. Statements of the accused under section 342 Cr.P.C. was recorded at Ex.10 in which they have denied the prosecution allegations and stated that charas has been foisted upon them. Accused did not lead any evidence in their defence and declined to examine themselves on oath in disproof of prosecution allegations.

7. We have carefully heard Mr. Nazeer Ahmed Bhatti, Advocate for appellants and Syed Meeral Shah Bukhari, D.P.G. and perused the evidence minutely.

8. Learned Advocate for the appellants has mainly contended that there are material contradictions in the prosecution evidence. He referred to the evidence of complainant / Investigation Officer namely Dinal Ali who has stated that Marhisnama of arrest and recovery was prepared by ASI Mazhar Ali whereas on the same point P.W. 2 H.C. Qamaruddin deposed that the same was prepared by ASI Dinal Ali. Learned Advocate for appellants further argued that according to the prosecution case charas was weighed from the shop but on the same point complainant has replied that charas was weighed with the scale it was lying in the Investigation box. Learned Advocate for appellants further argued that in the Mashirnama of arrest and recovery it is mentioned that two (02) pieces of the charas were separately sealed from the pieces recovered from accused Muneer Ahmed but Chemical Examiner received only one piece in respect of accused Muneer Ahmed. Learned Advocate for the appellants submits that accused Muneer Ahmed is running a shop in the bazaar and police had some malafide against him and he has falsely implicated in this case. Lastly, it is argued that according to the

prosecution case on spy information from the main bazaar the accused were arrested but no one from the public was associated by the Investigation Officer to act as a Mashir in this case. In support of the contentions reliance has been placed upon the case of SHAFIULLAH v. THE STATE [2007 Y.L.R. 3087].

9. Learned D.P.G. on the other hand argued that evidence of ASI Dinal Ali is supported by the mashir of arrest and recovery and report of Chemical Examiner was positive. He further contended that evidence of police officials is as good as other public witnesses. However, learned D.P.G. frankly conceded that there were major contradictions in the evidence of the prosecution witnesses.

10. Facts of this case as well as evidence produced before the trial court find an elaborate mention in the Judgment passed by the trial court and therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

11. It needs no reiteration that it is the primary duty of the prosecution to prove its case beyond reasonable doubt and its burden is not shifted under the presumption contained in Section 29 of the Control of Narcotics Substance Act, 1997. It only says that once the prosecution established recovery of narcotic substance beyond doubt it is then that the burden is shifted. Section 29 of the Act does not absolve the prosecution of its primary duty to prove its case beyond doubt.

12. From the close scrutiny of the evidence, it is crystal clear that prosecution case was highly doubtful for the reasons that according to the prosecution case accused persons were arrested from the bazaar and charas was recovered from them. It is very strange that ASI / complainant did not ask any private person to act as Mashir in this case. ASI despite spy information did not call shopkeepers to witness the recovery. Learned Advocate for appellant has pointed out some major contradictions in the

prosecution evidence. P.W.1 ASI Dinal Ali has stated that Mashirnama of arrest and recovery was prepared by ASI Mazhar Ali whereas P.W.2 H.C. Qamaruddin has deposed that Mashirnama was prepared by ASI Dinal Ali. Investigation Officer has deposed that he had weighed the charas with the scale lying in his Investigation box but it is mentioned in the Mashirnama of arrest and recovery (Ex.6/A) that charas was weighed at the shop. It has also been rightly pointed out by defence counsel that it is mentioned in the Mashirnama that two (02) pieces out of six (06) were taken for sending to the Chemical Examiner for analysis but as per report of the Chemical Examiner, he had received only one piece from the sample, assigned to accused Muneer Ahmed. Defence plea is raised by accused Rajib Ali that police was asking him to close the shop else pay to police, on his refusal he was arrested along with co-accused from the shop. In such circumstances it would be unsafe to rely upon the evidence of police officials without independent corroboration which is lacking in this case. Only one doubt in criminal case, has always been considered enough for extending benefit of doubt to accused. In this case, recovery proceedings have not been proved and there are material contradictions in the evidence of star witnesses on material points. It is well-settled principle of law that every doubt is required to be resolved in favour of the accused. Rightly reliance is placed upon the case of SHAFIULLAH v. THE STATE [2007 Y.L.R. 3087 Karachi]

13. In the light of what has been discussed above, we are of the considered view that prosecution has failed to prove its case against the accused beyond any reasonable doubt. For the above stated reasons, appeal is allowed, conviction and sentence recorded against appellants are set-aside. Appellants are present on bail, their bail bonds stand cancelled and surety is discharged.

JUDGE

JUDGE

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