

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

Cr. Appeal No. D — 82 of 2016.

PRESENT

Mr. Justice Naimatullah Phulpoto

Mr. Justice Rasheed Ahmed Soomro.

Appellant: Roshan s/o Muhammad Bux
Through Miss Nasra Shaikh, Advocate.

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

Date of Hearing: 28.02.2017

Date of Judgment: 14.03.2017.

J U D G M E N T

NAIMATULLAH PHULPOTO, J. Roshan, the appellant was tried by learned Ist Additional Sessions Judge / Special Court Hyderabad, in Special Case No.63 of 2014, on the charge of having been found in the possession of 03 Kilogram “Charas”. At the conclusion of the trial vide Judgment dated 30.04.2016, appellant was found guilty of the charge and convicted under section 9(c) Control of Narcotic Substance Act 1997, and sentenced to 05 years and 06 months R.I. and to pay fine of Rs.25000/-. In case of the default in payment of the fine, he was ordered to suffer S.I. for 05 months and 15 days. Benefit of Section 382-B Cr.P.C. was extended to him. The appellant, being aggrieved filed aforesaid appeal against his conviction and sentence.

2. Succinctly the facts are that SI Syed Salman Shah of Police Station ANF, left Police Station Hyderabad along with ASI Ali Muhammad, H.Cs. Abdul Hameed, Sher Muhammad and others on 22.11.2014 in the Government vehicle vide ‘Roynamcha’ entries No.05 at 1245 hours for

patrolling duty. ANF officials reached near 'Gopang Petrol Pump' at 1320 hours where Sub-Inspector Syed Salman Shah received spy information, that present accused was in possession of huge quantity of the narcotics at Kisana Mori. Pursuant to the spy information, ANF officials proceeded to the pointed place where they saw the present accused. He had a new motorcycle without number. Accused while seeing the ANF officials in the Government vehicle left motorcycle, threw plastic bag and jumped into the Kisana Mori Canal. Police Constables Kashan Ahmed and Manzoor and Hafeez also jumped into the Canal and caught hold the accused. Shopping bag and motorcycle of the accused were also taken into possession. It is alleged that Sub-Inspector asked private persons to act as 'Mashirs' but they refused. Thereafter, Sub-Inspector Syed Salman Shah made H.C. Abdul Hameed and P.C. Kashan Ahmed as 'Mashirs' and enquired the name of accused, to which he disclosed his name as Roshan s/o Muhammad Bux resident of Kisana Mori near Madina Mosque Taluka Tando Jam. Plastic bag was opened it contained three packets and there were two slabs of "Charas" in each packet. "Charas" was weighed, it was 03 Kilograms. Accused was arrested, "Charas" was sealed, personal search of the accused was conducted, cash of Rs.400 was also recovered from his possession. Motorcycle was a new one and applied for registration was written, its chases number was DSC-2204511. 'Mashirnama' of arrest and recovery was prepared. Thereafter, accused and the case property were brought to the Police Station where F.I.R. was lodged against the accused on behalf of State under section 9(c) Control of Narcotic Substance Act 1997.

3. During investigation 161 Cr.P.C. statements of the prosecution witnesses were recorded. 03 Kilograms "Charas" was sent to the Chemical Examiner on 22.11.2014, for chemical analysis positive chemical report was received. On the conclusion of usual investigation, final report was submitted against the accused for offence under section 9(c) Control of Narcotic Substance Act 1997.

4. Trial Court framed 'charge' against the accused under 9(c) Control of Narcotic Substance Act 1997, at Ex.2. Accused met the charge with denial. The prosecution at the trial produced P.W.1 SIP Syed Salman at Ex.4, who produced 'Roznamcha' entries No.5 & 6 dated 22.11.2014 at Ex.4/A, 'Mashirnama' of arrest and recovery at Ex.4/B, F.I.R. at Ex.4/C, Positive Chemical Examiner's report at Ex.4/E, P.W.2 Abdul Hameed at Ex.5. Thereafter, prosecution side was closed at Ex.06.

5. Statement of the accused under section 342 Cr.P.C. was recorded at Ex.07 in which he has denied the prosecution allegations and stated that prosecution witnesses have deposed against him falsely. Accused examined himself on oath in disproof of prosecution allegation and wanted to examine one Ghulam Shabir Shah in his defence but couldn't produce Ghulam Shabbir Shah before trial court for the evidence in his defence. In a question, what else he has to say? Accused replied that he was innocent and has been falsely implicated in this case at the instance of one Rustam Panhwar due to enmity.

6. We have carefully heard Miss Nasra Shaikh, advocate for appellant and Mr. Amjad Ali Sahito, Special Prosecutor ANF and perused the evidence minutely.

7. Learned Advocate for the appellant contended that no independent witness has been associated in the recovery proceedings and recovery 'Mashirs' were ANF officials whose testimony couldn't be accepted. Learned Advocate for appellant further argued that according to the prosecution case "Charas" was not recovered from physical possession of the appellant and his conviction under section 9(c) Control of Narcotic Substance Act 1997, was not sustainable under the law. Concluding the arguments learned advocate for the appellant argued that appellant is a poor person and supporter of a large family. He is in Jail for about 03 years and his sentence may be reduced to already undergone. In support of the contentions reliance has been placed upon the cases of **IKHTIAR v.**

THE STATE 2009 P.Cr.L.J.355 and **MUHAMMAD KHAN v. THE STATE**
2008 S.C.M.R. 1616.

8. Learned Special Prosecutor ANF on the other hand supported the impugned judgment. Learned Prosecutor ANF argued that accused has failed to show any ill-will or motive on the part of the ANF officials to falsely implicate him in the case. He further contended that evidence of ANF officials is as good as other public witnesses. Lastly contended that sentence awarded to accused is according to sentencing policy and it is not the case of reduction of sentence.

9. From the close scrutiny of the evidence it transpired that Syed Salman SIP ANF left Police Station on 22.11.2014 along with ASI Ali Muhammad, H.Cs Abdul Hameed, Sher Muhammad, Muhammad Umer, P.Cs Kashan and others in the Government vehicle vide 'Roynamcha' entry No.05 at 1245 hours for patrolling duty. When ANF officials reached at Kisana Mori at 1320 hours SIP Syed Salman received spy information that present accused was standing at the bank of the canal of Kisana Mori with huge quantity of the narcotics to deliver to some customers. On such information, ANF officials proceeded to the pointed place and reached at 1330 hours where they saw present accused in possession of shopping bag. He had also a motorcycle. SIP Syed Salman has deposed that accused while seeing the vehicle of the ANF official vehicle threw plastic 'Theli' and jumped into the Canal to avoid his arrest. Canal water was about 5 feet deep. It is stated that ASI Ali Muhammad, P.Cs Kashan Ahmed, Manzoor and Abdul Hafeez also jumped into the Canal and caught hold accused. SIP Syed Salman asked private persons to act as 'Mashirs' of the arrest and recovery but they refused. Thereafter, H.C. Abdul Hameed and P.C. Kashan were made as 'Mashirs'. Plastic 'Theli' was opened it contained 03 packets and there were 02 slabs in each packet, total weight of "Charas" was 03 Kilograms and such 'Mashirnama' of arrest and recovery was prepared in presence of the 'Mashir's'. Case property was sealed. From the possession of the accused cash of Rs.400

was also recovered. Thereafter, Investigation Officer brought accused and the case property to the Police Station ANF and lodged F.I.R. against the accused on behalf of the State. It was recorded vide crime No.19 of 2014 under 9(c) Control of Narcotic Substance Act 1997. Record further reflected that SIP Syed Salman sent 'Charas' to the Chemical Examiner on 24.11.2014 for chemical analysis and received positive report. During trial departure and arrival entries have been produced for the satisfaction of the Court so also the positive report of Chemical Examiner at Ex.4/E. Despite lengthy cross examination nothing favourable to the accused came on the record. SIP Syed Salman has denied the suggestion that 'Charas' was foisted upon the accused as he refused to pay the bribe of Rs.30,000/-. P.W.2 H.C. Abdul Hameed was the member of the ANF officials and has narrated the same story as stated by P.W.1 Syed Salman. He has deposed that he has acted as 'Mashir' of arrest and recovery. He was also cross examined at length and denied the suggestion that he had signed upon the "Mashirnama' at Police Station.

10. Evidence of SIP ANF Syed Salman supported by 'Mashir' of recovery inspires confidence and it is reliable and trustworthy. SIP has given details of recovery of charas from the accused. During cross examination no malafide on the part of the ANF officials has been brought on the record. Evidence ANF officials is corroborated by positive chemical report and recovery of motorcycle. Not a single major contradiction in the evidence of the ANF officials has been brought on record to discard their testimony. It may be mentioned here that for the satisfaction of the Court departure entry No.05 dated 22.11.2014 has also been produced before the trial court in the evidence in order to show that ANF officials had actually left for patrolling. Contention of defence counsel that charas was not recovered from the physical possession of accused is devoid of legal force for the reasons that accused was in possession of plastic bag, he threw it and jumped in to Canal and he was arrested in presence of Mashirs.

11. As regards to the contention of learned Advocate for appellant that private persons have not been associated as Mashirs of recovery in this case. We have already mentioned that appellant has failed to show any ill-will or motive on the part of the ANF officials to falsely implicate him, as such, non-citing of the public witness is not fatal to the prosecution case. Moreover, it is the matter of the record that private persons had refused to act as 'Mashirs'. Even otherwise Section 25 of Control of Narcotic Substance Act 1997, has specifically excluded Section 103 from its application in the cases of narcotics. Reliance is placed upon the case of **MUHAMMAD KHAN v. THE STATE** 2008 S.C.M.R. 1616. Relevant portion is reproduced as under:-

“9. The other objection of learned counsel for the petitioner regarding non compliance of the provisions of section 103, Cr.P.C. is also misconceived as much as by virtue of section 25 of the Control of Narcotic Substances Act, 1997 non-citing of a public witness is not fatal to the prosecution case as section 103, Cr.P.C., has been specifically excluded from its application in cases of narcotics. In this regard, reference can be placed on the case of Zulfiqar Ahmad v. The State, 2006 SCMR 800.”

12. The contention of learned Advocate for the appellant that SIP Syed Salman was the complainant as well as Investigation Officer of the case. There is no prohibition in the law for the police officer to investigate the case lodged by him as held by Honourable Supreme Court in the case of **ZAFAR v. THE STATE** 2008 SCMR 1254, it is held as follows:-

“11. So far as the objection of the learned counsel for the applicant that the Investigation Officer is the complainant and the witness of the occurrence and recovery, the matter has been dealt with by this Court in the case of State through Advocate-General Sindh v. Bashir and others PLD 1997 SC 408, wherein it is observed that a Police Office is not prohibited under the law to be complainant if he is a witness to the commission of an offence and also to be an

Investigating Officer, so long as it does not in any way prejudice the accused person. Though the Investigation Officer and other prosecution witnesses are employees of A.N.F., they had no animosity or rancor against the appellant to plant such a huge quantity of narcotic material upon him. The defence has not produced any such evidence to establish animosity qua the prosecution witnesses. All the prosecution witnesses have deposed in line to support the prosecution case. The witnesses have passed the test of lengthy cross-examination but the defence failed to make any dent in the prosecution story or to extract any material contradiction fatal to the prosecution case. The prosecution has been successful to bring home the guilt of the appellant to the hilt by placing ocular account, recovery of narcotic material, the Chemical Examiner report G.1, Exh.P.3. The learned counsel for appellant has not been able to point out any error of law in the impugned judgment and the same is unexceptionable.

13. Moreover, defence counsel has failed to show any ill-will on the part of ANF officials to falsely implicate accused in this case. As regards to the defence theory that the appellant has been falsely implicated in this case at the instance of one Rustam Panhwar with whom the accused was on inimical terms. Accused / Appellant wanted to examine Ghulam Shabbir Shah in his defence but could not produce Ghulam Shabbir Shah in his defence before the trial court. We, therefore, hold that defence plea was improbable and afterthought. We have no hesitation to hold that prosecution has proved its case against the appellant beyond any shadow of doubt.

14. As regards to the last submission of learned Advocate for reduction of sentence that appellant has remained in Jail for the period of more than 03 years and he is supporter of a large family. Learned Lahore High Court in the case of **GHULAM MURTAZA & another v. THE STATE** P.L.D. 2009 Lahore 362, laid down sentencing policy according to the quantity of the narcotics substance. The said judgment has been upheld by the

Honourable Supreme Court of Pakistan in the case of AMEER ZEB v. THE STATE P.L.D. 2012 SC 380. In the case of GHULAM MURTAZA (supra) sentence in the case of recovery of 'Charas' more than 03 kilograms would be rigorous imprisonment for 06 years & 06 months. Therefore, even no case for reduction of sentence is made out.

15. In view of above, we reached at the conclusion that the impugned Judgment passed by learned trial court does not suffer from any illegality, gross irregularities or infirmities so as to call for interference by this court. The learned trial Court has advanced valid and cogent reasons for passing the impugned Judgment and we see no legal justification to disturb the same. Consequently, appeal is without merits and the same is dismissed.

JUDGE

JUDGE

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