

IN THE HIGH COURT OF SINDH CIRCUIT COURT, HYDERABAD.

Present:

MR. JUSTICE NAIMATULLAH PHULPOTO

MR. JUSTICE RASHEED AHMED SOOMRO

Criminal Jail Appeal No.D-66 of 2014

Date of hearing: 14.03.2017.

Date of decision: 14.03.2017.

Appellants : Muhammad Budhal and another;
Through Syed Shafique Ahmed Shah,
Advocate.

Respondent : The State
Through Shahzado Salim Nahyoon, A.P.G.

J U D G M E N T

RASHEED AHMED SOOMRO-J:- This appeal has been preferred against the conviction and sentence recorded by the learned III-Additional Sessions Judge, Hyderabad/Special Court, Control of Narcotics Substance, vide judgment dated 05.06.2014 in Special Case No.11of 2013, whereby the appellant No.1 Muhammad Budhal has been convicted under section 9(c) of C.N.S Act 1997, and sentenced to seven years R.I besides fine of Rs.10,000/-, in case of default in payment of fine, he was ordered to suffer further one month S.I, while appellant No.2 Altaf Ali has been convicted under Section 9(b) Control of Narcotics Substances Act, 1997, sentenced to suffer two years R.I and to

pay fine of Rs.5000/-, in case of default in payment of fine, he has been ordered to suffer further one month S.I. The appellants were, however, extended benefit of Section 382-B Cr.P.C.

2. The relevant facts of prosecution case are that on 16.03.2013 complainant AETO Syed Muhammad Sadqeen on an information arrested the accused from Tando Jam Railway station at about 1630 hours and six pieces of opium weighing 50 grams were recovered from accused Muhammad Budhal, 42 pieces of charas weighing 170 grams were recovered from appellant Altaf Ali. It is further alleged that accused Muhammad Budhal led the excise officials to his house and produced 02 K.Gs and 150 grams of opium from the iron box lying in room of his house. Such mashirnamas were prepared in presence of mashirs and case property was sealed at spot. Complainant thereafter lodged F.I.R. against the accused on behalf of State vide Crime No.03 of 2013 P.S FIB Karachi District Hyderabad for the offences under Section 9(c) and 9(b) of Control of Narcotics Substances Act, 1997.

3. During investigation of the case complainant recorded the statements of the P.Ws under Sections 161 Cr.P.C, sent the chars and opium to the Chemical Examiner for chemical examination and after completion of investigation he submitted challan of the case against accused.

4. Trial Court framed charge (Ex.2) against both accused under section 9(b) and 9(c) of Control of Narcotic Substances Act, 1997. Both accused pleaded not guilty to the charge, and claimed to be tried.

5. At the trial, the prosecution examined P.W-1/complainant AETO Syed Muhammad Sadqeen at Ex.5, he produced two mashirnamas, entries, and F.I.R at Ex.5/A to 5/D, and P.W-2/mashir EI Nisar Ahmed at Ex.6. Thereafter, prosecution closed its side by statement Ex.7

6. Statements of accused were recorded under Section 342 Cr.P.C by the trial court wherein they denied the prosecution allegations, and pleaded innocence. However, neither they examined themselves on oath nor led any evidence in their defence.

7. Learned trial Court after hearing the learned counsel for the parties and assessment of evidence convicted and sentenced the accused as stated above.

8. As the facts so also evidence have already been given by the trial Court in impugned Judgment, therefore, the same need not to be repeated to avoid repetition.

9. Learned Counsel for the appellants argued that the appellants have been falsely involved in this case by the complainant at the instance of Habibullah Lashari by foisting chars and opium upon them. He further argued that there are material contradictions in the evidence of prosecution witnesses, which make the case doubtful. Lastly, he prayed for acquittal of the appellants.

10. Mr. Shahzado Salim Nahyoon, A.P.G for the State frankly conceded the lacunas in the prosecution case and did not support the impugned judgment.

11. We have considered the above submissions of the learned

Advocate for appellants as well as learned A.P.G for the State and gone through the entire evidence minutely. In order to prove its case the prosecution has examined two witnesses i.e. complainant/I.O AETO Syed Muhammad Sadqeen and Mashir Excise Inspector Nisar Ahmed. Perusal of their evidence shows that there are material contradictions in their evidence; which are re-produced as under:

1. Complainant/I.O deposed that he received spy information through cell phone while mashir deposed that spy informer was with the complainant.
2. Mashir deposed that lady searcher Mumtaz Bibi also put her signature on the mashirnama while complainant deposed that no lady constable was accompanied with them.
3. Complainant admitted the suggestion that he sent the dummy to the accused to purchase the narcotics from the accused persons, while mashir E.I Nisar Ahmed admitted the suggestion that no dummy was sent by the complainant.

12. Apart from the above contradictions; perusal of Chemical Examiner's report shows that the parcels of case property was bearing the signatures of Excise Inspector Nisar Ahmed, EC Abdul Rasheed and Lady Searcher Mumtaz Bibi. Admittedly, lady searcher Mumtaz Bibi was not with the raiding party. As per prosecution case the property was sealed at the spot, if this version of the prosecution is taken as true then how the parcels of the case property had the signatures of lady searcher Mumtaz Bibi, who admittedly was not with the raiding party; this shows that alleged recovered opium and charas were not sealed at the spot. It created doubt that opium and charas were sealed at spot and sent to the

Chemical Examiner, in such circumstances the report of Chemical Examiner was doubtful. In the case of Muhammad Hashim v. The State (PLD 2004 SC 856), it has been held as under:-

“It emerges there from that vide recovery memo. Exh.P/1-A, 4 grams of Charas was taken out from total 288 rods. Nothing is available on record to show whether sample for examination by Chemical Examiner was taken out from each rod to ascertain that 288 rods were of Charas or some other commodity, having resemblance with the colour of Charas like Oil Cake (Khal) etc. It is to be noted that under Act, 1997, stringent sentence have been provided if offences charged against the accused within any component of section 9 is proved. Therefore, for such reason, Act 1997 has to be construed strictly and the relevant provisions of law dealing with the procedure as well as furnishing the proof like the report of expert, etc. are to be followed strictly in the interest of justice, otherwise in such-like cases it would be impossible to hold that total commodity recovered from his possession was charas. However, in the given facts and circumstances of the case, it would be presumed that sample was taken out from only one rod. As far as remaining rods are concerned, in absence of any sample taken out from them, it would not be possible to hold that they were the rods of Charas or otherwise. Therefore, taking into consideration this aspect to the case, we are of the opinion that for such reason, the case of the prosecution has become doubtful, as such, sentence awarded to appellant by the trial Court and maintained by the High Court is not sustainable.”

Under the Control of Narcotics Substances Act, 1997 stringent punishments have been provided if a case under Section 9 of the Act is proved. Therefore, the provisions of said Act have to be construed very strictly.

13. It is settled principle of law that for giving benefit of doubt to accused it is not necessary that there should be many circumstances creating doubt, if a simple circumstance creates reasonable doubt about the guilt of accused he will be entitled to such benefit not as a matter of grace and concession but as a matter of right. In this regard, reliance is placed on the case of Tarique Pervez vs. The State (1995 SCMR 1345). Relevant portion is reproduced as follows:-

“The aforesaid narration of the evidence on record will show that two separate parcels containing one gram heroin sold by the appellant to Muhammad Shafi and one gram heroin separated from heroin weighing 1099 grams were prepared by the police and only one parcel was sent to the Chemical Examiner for examination and report. As such it cannot be said with judicial certainty that the parcel containing sample heroin was sent to the Chemical examiner. The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance 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.”

14. In view of the above discussion, we hold that the prosecution has not been able to prove its case against the appellants beyond any reasonable shadow of doubt, therefore, we allow this appeal and acquit the appellants namely Muhammad Budhal and Altaf Ali of charges. They are present on bail, their bail bonds stand cancelled and surety is hereby discharged.

Above are the reasons of our short order passed on 14.03.2017.

JUDGE

JUDGE

