

JUDGMENT SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD
Cr. Appeal No.D-31 of 2004

PRESENT

Mr. Justice Naimatullah Phulpoto
Mr. Justice Rasheed Ahmed Soomro

Date of Hearing: 24.03.2017
Date of Judgment: 24.03.2017
Appellants/accused: Through Mr. Ghulamullah Chang,
Advocate
The State: Through Syed Meeral Shah Bukhari,
Deputy Prosecutor General, Sindh.

JUDGMENT

RASHEED AHMED SOOMRO, J:- Appellants Taiz Ali and Muhammad Malook faced trial before learned Special Judge CNS, Nawabshah for the offence under Section 6/9 Control of Narcotic Substances Act, 1997. By judgment dated 26.02.2004, appellant Taiz Ali was convicted under Section 9(b) Control of Narcotic Substances Act, 1997 and sentenced to one year R.I and to pay a fine of Rs.2000/-, in case of default in payment of fine, he was ordered to suffer two months R.I. Appellant Malook was also convicted under Section 9(a) Control of Narcotic Substances Act, 1997 and sentenced to suffer 09 months R.I and to pay a fine of Rs.1000/-, in case of default in payment of fine, he was ordered to suffer one month R.I. Benefit of Section 382(B) Cr.P.C was expended to both the appellants.

2. Brief facts of the prosecution case are that on 08.06.2000 at 2030 hours SHO P.S Taluka Nawabshah left police

station alongwith his subordinate staff namely P.Cs Abdul Latif, Abdul Malik, Khuda Dino and Ganhwar Khan for patrolling duty vide roznamcha entry No.17. When the police party reached at Pangrio Mori at 1715 hours, they saw two persons standing in a suspicious manner. Police surrounded and caught-hold them. On the inquiry, one person disclosed his name as Taiz Ali. His personal search was conducted in presence of the mashir and from his possession 150 grams opium was recovered, out of which 20 grams were separated as sample for sending to the chemical examiner for analysis. Another person disclosed his name as Malook and from his possession 100 grams of opium were recovered, out of which 20 grams were separated as sample for sending to the chemical examiner for analysis. Both the accused were arrested at the spot. Mashirnama of arrest and recovery was prepared. Thereafter, the accused and the recovered case property were brought to the police station, where FIR was lodged against them vide Crime No.65 of 2000 for the offence under Section 9 of Control of Narcotic Substances Act, 1997.

3. During the investigation, samples were sent to the chemical examiner for analysis. Positive chemical report was received. On the completion of usual investigation, challan was submitted against both accused.

4. Charge was framed against the accused at Ex-2. Both the accused pleaded not guilty and claimed to be tried. In order to substantiate the charge, the prosecution examined the witnesses

namely S.I Shabir Ahmed Sehar at Ex-5 and P.C Abdul Latif at Ex-9. Thereafter, prosecution side was closed.

5. Statement of accused was recorded under Section 342 Cr.P.C, in which the accused claimed their false implication in this case and denied the recovery of opium from their possession. Accused neither examined themselves on oath nor led any evidence in their defence. Trial Court after hearing the learned Counsel for the parties and assessing the evidence convicted and sentenced both the accused as stated above.

6. Mr. Ghulamullah Chang, learned Advocate for the appellants mainly contended that place of arrest of the accused and recovery is thickly populated area. SHO avoided to call any private person to act as mashir in this case to witness the recovery. He further contended that there was inordinate delay in sending the sample of opium to the chemical examiner for analysis, as such positive report of the chemical examiner would not be beneficial to the case of the prosecution. Learned Advocate for the appellant highlighted the contradictions in the evidence of the prosecution witnesses and argued that the prosecution evidence was highly unbelievable and the Trial Court has failed to appreciate the evidence according to the settled principles of law.

7. Syed Meeral Shah Bukhari, learned D.P.G argued that evidence of police officials is as good as that of other private persons. Learned D.P.G further argued that evidence of

prosecution witnesses is corroborated by positive chemical report.

He has supported the judgment of Trial Court.

8. In order to appreciate the contentions, we discuss evidence of P.Ws. P.W-1 complainant SHO Ghulam Shabir Sehar has deposed in examination-in-chief as under:-

“On 8.6.2000, I was SHO Taluka Nawabshah. I made the Entry at Sr.No.17 of my Roznamcha for the departure of patrolling party headed by me, including my subordinate staff namely PC Abdul Latif, PC Khuda Dino, PC Abdul Malik, PC Munawar Khan driver Muhammad Hanif, with official vehicle bearing No.GS-4797. We left the police station at 1715 hours for the purpose of patrolling the area located in between Nawabshah and Chanasar Goth at Kazi Ahmed link road. We took the way leading to Pangrio road and reached water logged area. It was 1800 hours when we found two persons as passing through there from. We found them suspect for drugs crime. We apprehended them. They disclosed their names and other particulars as Taiz Ali S/o Muhammad Rahim Jamali and Malook S/op Dhani Bux Mari r/o Rojhan Taluka Hala, District Hyderabad, and village Guhram Mari Taluka Sakrand District Nawabshah respectively. Both the accused were dressed with Shalwar and Kameez. I do not remember the colours of their dress. I searched out both the apprehended persons one by one. The first searched out person was Taiz Ali. I secured from the front pocket of Taiz Ali a piece of Opium weighing 150 grams. I carried its weight. The piece was in round shape. The other culprit namely Malook when searched out, was found in possession of one piece of opium weighing 100 grams. I carried out the weight. The piece was in round shape. I took out 20 grams of each of the said pieces as sample for the chemical examination and report. I prepared the parcels for each set of the opium, total parcels I prepared, were 4 in number. Two were as sample and the others were for the rest of the secured property. I prepared the memo of search and recovery. The memo was prepared in the head light of the official vehicle as it was dark. We brought the accused and the case property at the Police Station. I registered the FIR against both the accused persons. I recorded the statements of the witnesses u/s 161 Cr.P.C. I handed over the case property including the sample for the Chemical Examination to the WHC of

the Police Station. I do not remember his name. I do not know the date of dispatch of the said sample to the expert by the said WHC. I do not remember the tenure of my posting as SHO at Police Station after registration of the present FIR. I produce the FIR of the case as Ex-6. I also produce the memo of search, arrest and recovery as Ex-7. I also produce the Chemical Examiner's report obtained in the instant case in respect of the secured sample as positive as Ex-8. The chemical examiner's report shows dispatch of the property to the expert on 20.6.2000 i.e. the delay of 12 days. According to the practice, this property remained in the police station with the WHC whose name I do not remember. The property during the intervening period is expected to have remained untouched. Property present in court in two pieces is same. They are not round in shape as I have deposed with reference to search and recovery. The case property i.e. two pieces of the opium available in the court is in irregular shape. They are the same. The accused persons are the same. The piece recovered from the accused Malook which was weighing 100 grams without deduction of sample and which after deduction of 20 grams was carrying 80 grams of Opium, is carrying weight of 60 grams in the court and similarly the piece recovered from the accused Taiz Ali has been found to be weighing 100 grams in the court instead of 130 grams. The difference or decrease in weight of the pieces is due to passage of time which caused the opium dried and reduced in weight as such. I am not expert in this regard. This is my personal view which is based on observation and experience."

9. P.W-2 Mashir Abdul Latif has supported the evidence of the complainant and stated as under:-

"On 8.6.2000 I was posted in Taluka Police Station Nawabshah. I was on duty as PC. PC Khuda Dino, PC Abdul Malik, PC Ganhwar Khan and SHO Haji Ghulam Shabir Sehar were also present in the Police Station. We left the Police Station in the Official Mobile/Vehicle GS-4797 as patrolling party for patrolling purpose as per the police entry No.17 at 5:15 p.m. We reached link road of Nawabshah to Chanasar Village near Pangrio Mori at 1800 hours. We found two suspects as running towards Pangrio Mori after seeing the police party as coming towards them. We apprehended them. They disclosed their names as Taiz Ali S/o Rahim Jamali r/o Hala aged about 40 years, 6 feet in height, and Malook s/o Dhani Bux Mari r/o Ghulam Mari Taluka Daulatpur

aged about 40 years, 5 feet 6 inches in height. The SHO conducted the personal search of the suspects first Taiz Ali and then Malook. The SHO secured a plastic bag containing Opium weighing 150 grams from the front pocket of suspect Taiz Ali. The SHO secured from the side pocket of the shirt of suspect Malook a plastic bag of like nature containing Opium weighing 100 grams. The SHO found no other incriminating or otherwise material excepting the said one from the possession of the suspects as a result of such search. The SHO prepared memo as to such search and recovery on the spot. The SHO obtained signatures of the mashirs on such memo. I and P.C Abdul Malik were appointed as mashirs. The SHO prepared two samples of 20 grams of Opium out of the recovered material of each suspect for chemical examination and report. We then came back to the police station alongwith the culprits and the crime property. I see the Ex-7. It is same. It bears my signature and that of the other mashir. I was examined u/s 161 Cr.P.C in the instant case. The other mashir was also so examined by the SHO. The case property is the same. The accused are also same.”

10. Both the above named prosecution witnesses were cross-examined at length. It has come on record that place of arrest of the accused and recovery was thickly populated area. SHO Ghulam Shabir Sehar has deposed that the opium was recovered in the round shape from the possession of accused but at the time of cross-examination, he replied that property/opium produced in the Court was not round in shape. Investigating Officer has admitted that he dispatched samples of opium to the chemical examiner after 12 days and he was not aware about the name of WHC to whom he had handed over the case property. None of the prosecution witnesses has deposed a single word as to what had happened to the recovered substance after its recovery and with whom the same had been deposited for safe custody for such a long time, as such we have no hesitation to hold that evidence

regarding safe custody of the recovered substance is not available on the record. It would be unsafe to uphold and maintain the conviction

11. Moreover, the mashir Abdul Latif has also given the different version with regard to the places of patrolling for reaching at the place of arrest of the accused and recovery of opium. He has given different description of the property as given by the SHO. In such circumstances, we are unable to rely upon the evidence of the police officials without independent corroboration, which is lacking in this case. It is settled principle of law that a single circumstance, which creates doubt in the prosecution case, is sufficient to extend benefit of doubt to the accused but in this case there are several circumstances, which have created doubt in the prosecution case but unfortunately the prosecution evidence has not been appreciated by the Trial Court according to the settled principle of law. It is quite certain that the applicability of provisions of Section 103 Cr.P.C has been excluded under the Control of Narcotic Substances Act, 1997, yet, it does not debar or prohibit the officers making recoveries on such places, which are necessarily surrounded by people to take some steps/measures to associated private persons in the process so as to lend credence to the recovery and create confidence in general public, which is in the process of quick erosion so far as the role of police and other law enforcement agencies is concerned. Under the Control of Narcotic Substances Act, 1997 stringent sentences have been

provided if offence under Section 9 of the Act is proved. Therefore, the provisions of the said Act have to be construed very strictly. Present accused have raised a specific plea that they have been involved falsely by the police. In such circumstances, prosecution evidence required independent corroboration which is lacking in this case, therefore, the case of the prosecution is highly doubtful.

12. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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 stated reasons, we have no hesitation to hold that prosecution has failed to prove its case against the appellants beyond shadow of doubt, therefore, conviction and sentence recorded by the Trial Court vide judgment dated 26.02.2004 are set aside. Resultantly, the appeal in hand is allowed. Appellants are present on bail, their bail bonds stand cancelled and surety discharged. These are the reasons for our short order dated 24.03.2017 announced in open Court.

JUDGE

JUDGE

