

JUDGMENT SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD
Cr. Appeal No.D-53 of 2015

PRESENT

Mr. Justice Naimatullah Phulpoto
Mr. Justice Rasheed Ahmed Soomro

Date of Hearing: 20.03.2017
Date of Judgment: 20.03.2017
Appellant/accused: Through Mr. Hameedullah Dahri,
Advocate
The State: Through Mr. Shahzado Saleem
Nahiyoan, Assistant P.G Sindh.

J U D G M E N T

NAIMATULLAH PHULPOTO, J:- Appellant Dilbar S/o Kehar Mari was tried by learned Special Judge, CNS, Sanghar for the offence under Section 9(b) of Control of Narcotic Substances Act, 1997. By judgment dated 29.05.2015, the appellant was convicted under Section 9(b) of Control of Narcotic Substances Act, 1997 and sentenced to suffer 03 years R.I and to pay a fine of Rs.10,000/-, in case of default in payment of fine to suffer S.I for 30 days more with benefit of Section 382(B) Cr.P.C.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 07.05.2015 at 1615 hours, complainant SIP Muhammad Ayoob of Police Station Khahi left the Police Station vide Roznamcha Entry No.15 alongwith subordinate staff for patrolling, while patrolling at different places, the police party reached at Bus Staff Khahi, they received spy information that

present accused was selling charas near Irrigation Bungalow. On such spy information, the police party proceeded to the pointed place and reached there at about 1800 hours and saw the present accused there. The accused tried to run away but he was surrounded and caught-hold. On inquiry, accused disclosed his name as Dilbar S/o Kehar Mari. His personal search was conducted by SIP Muhammad Ayoob in presence of mashirs, during search one black polythene shopper was recovered from side pocket of his shirt, it contained 10 small and big pieces of charas, weighing 500 grams, out of which, the SIP secured small quantity from each piece and separated 20 grams for sending it to the chemical examiner for analysis. Samples and the remaining charas were separately sealed. Currency notes of Rs.1700/- were also recovered from the pocket of the accused. Mashirnama of arrest was prepared in presence of the mashirs P.Cs Ahsan Ali and Umaid Ali. Thereafter, the accused and case property were brought to the Police Station, where SIP Muhammad Ayoob lodged the FIR against the accused on behalf of the State, it was recorded vide Crime No.11/2014 for the offence under Section 9(b) of CNS Act, 1997.

3. During the investigation, 161 Cr.P.C statement of P.Ws was recorded. Sample of 20 grams charas was sent to the chemical examiner for analysis and positive report was received. On the completion of the investigation, challan was submitted against the accused under Section 9(b) of CNS Act, 1997.

4. Trial Court framed the charge against the accused under Section 9(b) of CNS Act, 1997, accused pleaded not guilty and claimed to be tried. Prosecution in order to prove It's case, examined P.W-1/complainant SIP Muhammad Ayooob at Ex-03, he produced attested copy of Roznamcha Entry No.15 at Ex-03/A, memo of arrest and recovery of charas at Article "A" and two currency notes at Article "B". The prosecution also examined P.W-2 Mashir P.C Ahsan Ali at Ex-04, he produced memo of inspection of place of incident at Ex-04/A and P.W-03 SIP Abdul Rasheed Chandio, Investigating Officer at Ex-05, he produced chemical examiner's report at Ex.05/A. Thereafter, the prosecution closed the side vide statement dated 20.05.2015 at Ex-06.

5. Statement of accused under Section 342 Cr.P.C was recorded at Ex-07, whereby the accused denied the recovery of charas from his possession and claimed his innocence. Accused neither examined himself on oath nor led any evidence in defence. Trial Court after hearing the learned Counsel for the parties and on assessment of the evidence convicted and sentenced the appellant/accused as stated above.

6. Learned Advocate for the appellant argued that there are material contradictions in the evidence of the complainant and mashir on material points, which created serious doubts in the prosecution case. He further argued that the complainant has admitted in his cross-examination that he did not call private persons from the vicinity, though it was thickly populated area.

He has also argued that there was delay of five days in sending the samples of charas to the chemical examiner, for which no plausible explanation has been furnished. It is also contended that appellant/accused has been falsely implicated in this case at the instance of a landlord Khuda Bux Dars, Ex-Taluka Nazim Khipro and the Trial Court has failed to appreciate the evidence according to the settled principles of law.

7. On the other hand, the learned Deputy Prosecutor General argued that the evidence of the police officials is as good as of private persons. He has submitted that there are no material contradictions in the evidence of the prosecution witnesses. Lastly argued that delay in sending sample of the charas to the chemical examiner would not be fatal to the prosecution case.

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 29.05.2015, therefore, the same may not be reproduced here, so as to avoid duplication and unnecessary repetition.

9. We have carefully heard the learned Counsel for the parties and scanned the entire evidence. According to prosecution case, accused was arrested from thickly populated area but no private person was associated as mashir of recovery. 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, 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. It has been ruled by the Honourable Supreme Court in the case of *Muhammad Hashim v. The State (PLD 2004 SC 856)* that under the Control of Narcotic Substances Act, 1997 stringent sentences have been provided if offence charged under Section 9 of the Act is proved. Therefore, the provisions of the said Act have to be construed very strictly. It is high time for the Courts to ensure that the proceedings of recovery and seizure are made in the most transparent and confidence inspiring manner so as to protect the innocent citizens from the highhandedness of the law-enforcers, and to save them from the agony of uncalled for trials and tribulations. We have observed that Sub-Inspector and Mashir have mentioned the different places of the patrolling for reaching to the place from where the accused was arrested. It is also not clear that how many grams of charas were taken as sample from each piece of the charas recovered from the possession of accused. Arrival roznamcha entry has also not been produced for the satisfaction of the Court. Accused has raised specific defence plea that he has been involved in this case at the instance of Khuda Bux Dars, Ex-Taluka Nazim, Khipro. In such circumstances, evidence of independent witness was required but independent corroboration is lacking in this case. Material contradictions on material points and

delay in sending charas to chemical examiner without explanation have created doubts in prosecution case. Burden was on prosecution to prove charge beyond reasonable doubt. In such circumstances, the case of the prosecution is highly doubtful. Conviction cannot be based on such type of evidence. Rightly 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.”

10. 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 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)*.

11. For the above stated reasons, we have come to the conclusion that prosecution has failed to prove its case. Trial Court has failed to appreciate the evidence according to settled principles of law, therefore, appeal is accepted, resultantly conviction and sentence recorded by the Trial Court vide judgment dated 29.05.2015 are set aside. Appellant is present on bail, his bail bond stands cancelled and surety discharged. These are the reasons for our short order dated 20.03.2017 announced in open Court.

JUDGE

JUDGE

Shahid