

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Appeal No.D-65 of 2014

PRESENT

Mr. Justice Naimatullah Phulpoto

Mr. Justice Zulfiqar Ahmad Khan.

Date of Hearing: 05.04.2017
Date of Judgment: 05.04.2017
Appellant/accused: Through Mr. Mumtaz Alam Laghari,
Advocate
The State: Through Syed Meeral Shah Bukhari,
Deputy Prosecutor General, Sindh.

JUDGMENT

NAIMATULLAH PHULPOTO, J:- Appellant Muhammad

Anwer was tried by learned Sessions Judge/Special Court (CNSA), Tando Muhammad Khan in Special Case No.10 of 2013 for the offence under Section 9(c) Control of Narcotic Substances Act, 1997. By judgment dated 29.05.2014, the appellant was convicted under Section 9(c) Control of Narcotic Substances Act, 1997 and sentenced to suffer 04 years and 06 months R.I and to pay a fine of Rs.20,000/-, in case of default in payment of fine, the appellant shall suffer S.I for 05 months more. However, benefit of Section 382(B) Cr.P.C was extended to the appellant.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 30.03.2013 SIP Mehmood Akhtar Qureshi left Police Station, Tando Muhammad Khan in government vehicle vide roznamcha entry No.52 at 0715 hours for patrolling alongwith his

subordinate staff. While patrolling at different places, the police party reached at Burira Mohalla. It is alleged that SIP received spy information that accused Muhammad Anwer and one Attan Mallah were selling charas openly at the shrine of Pir Jhando. Pursuance to such spy information, the police party proceeded to the pointed place, where they saw that appellant Muhammad Anwer and Attan Mallah standing there, they were carrying plastic bags in their hands. It is also alleged that H.C Ali Nawaz identified them to be Attan Mallah and Anwer Mallah. Both the accused while seeing the police party tried to run way. However, the police party caught-hold accused Muhammad Anwer and accused Attan Mallah succeeded to run away. SIP recovered plastic bag from the possession of accused Muhammad Anwer Mallah and opened it in presence of the mashirs H.C Ali Nawaz and DPC Ghulam Shabeer. Plastic bag contained one big piece and six small pieces of charas. Charas was weighed, it was 1030 grams, out of which 10 grams were separated for sending to the chemical examiner for analysis and the remaining charas was sealed separately. It is further alleged that private persons were not available at the spot from where charas was recovered. From the personal search of the accused, cash of Rs.3,100/- was recovered. Mashirnama of arrest and recovery was prepared in presence of the mashirs. Thereafter, the accused and recovered property were brought to the Police Station, where FIR against the accused on behalf of the State was lodged, it was recorded vide Crime No.74 of 2013 for the offence under Section 9(c) of CNS Act, 1997.

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

4. Trial Court framed the charge against accused Muhammad Anwer under Section 9(c) of CNS Act, 1997 at Ex-2. Accused pleaded not guilty and claimed to be tried.

5. Prosecution, in order to prove its case examined P.W-1 SIP Mehmood Akhtar Qureshi at Ex-4, who produced roznamcha entry No.52 & 15, memo of arrest and recovery, FIR, report of chemical examiner and original roznamcha entry Nos.52 & 15 at Ex-4/A to 4/G respectively. P.W-2 mashir Ali Nawaz Laghari at Ex-5. Thereafter, the prosecution closed its side vide statement at Ex-6.

6. Statement of accused under Section 342 Cr.P.C was recorded at Ex-7 in which the accused denied the allegations of recovery of charas from his possession and claimed to have been falsely implicated in this case. Pleas raised by the accused that the P.Ws are police officials and they are interested and have inimical terms with him. Complainant/SIP Mehmood Akhtar and other police officials committed robbery at the otaq of his uncle Attan Mallah. Thereafter, FIR was registered against the police officials

including SIP who is complainant in this case. It is stated by the accused that copy of the complaint and news cuttings have been produced by the accused in his statement recorded under Section 342 Cr.P.C. Accused did not lead any evidence in his defence and also declined statement on oath.

7. Trial Court after hearing the learned Counsel for the parties and assessment of the evidence, convicted and sentenced the accused as stated above. Hence, this appeal is filed.

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 29.05.2014, therefore, the same may not be reproduced here, so as to avoid duplication and unnecessary repetition.

9. Learned Advocate for appellant Muhammad Anwer mainly contended that it was the case of spy information accused was arrested at the shrine of Pir Jhando but no private person was associated as a mashir in this case. It is also argued that according to the prosecution case, one Attan Mallah was also accompanied with the present appellant but police did not arrest him and he succeeded in running away. It is contended that evidence of the police officials did not inspire confidence. It is also contended that in roznamcha entry No.52, there was no signature of SIP, which has created doubt in the arrival and departure roznamcha entries. Learned Counsel for the appellant argued that there was inordinate delay in sending the sample to the chemical examiner. Learned

Counsel for the appellant has further argued that the charas was recovered from the possession of the accused on 30.03.2013 but it was sent to the chemical examiner for analysis on 02.04.2013 and such delay has not been plausibly explained by the prosecution. Learned Counsel for the appellant also argued that there are material contradictions in the evidence of the prosecution witnesses on so many material particulars of the case. Lastly, it is contended that SIP Mehmood Akhtar Qureshi of P.S Tando Muhammad Khan had committed robbery from the house of Muhammad Soomar and he had filed direct complaint against the SHO and the SHO lodged FIR against the accused to pressurize Muhammad Soomar, who is uncle of the accused, to withdraw from the said direct complaint. In support of the contentions, learned Counsel for the appellant argued that the prosecution evidence was quite unreliable and untrustworthy, which suffered from a number of infirmities. In support of the contentions, learned Counsel for appellant has relied upon the cases of *TARIQ PERVEZ V/S. THE STATE (1995 SCMR 1345)* & *MUHAMMAD AKRAM V/S. THE STATE (2009 SCMR 230)*.

10. Syed Meeral Shah Bukhari, learned D.P.G appearing for the State has argued that all the prosecution witnesses have fully supported the case of the prosecution and evidence of the police officials is as good as that of private persons. Learned D.P.G further argued that sample was taken from the charas recovered from the accused and positive chemical report was received. He

further argued that the Trial Court has appreciated the evidence according to the settled principles of law and he has supported the impugned judgment.

11. We have carefully heard the learned Counsel for the appellant as well as learned D.P.G for the State and scanned the evidence. At the cost of the repetition, it may be mentioned here that SIP Mehmood Akhtar Qureshi had deposed that on 30.03.2013 he was posted as SIP at Police Station, Tando Muhammad Khan. On the said date, he alongwith his subordinate staff left Police Station at 0715 hours and patrolled at different places. When the police party reached at Burira Mohalla, SIP Mehmood Akhtar Qureshi received spy information that Attan Mallah and Muhammad Anwer Mallah were selling charas at the shrine of Pir Jhando. Police party proceeded there in a government vehicle and saw that Attan Mallah and Muhammad Anwer Mallah were present there and they were carrying plastic bags in their hands. They were identified by H.C Ali Nawaz. He has further deposed that accused Attan Mallah succeeded in running away. However, the police party caught-hold accused Muhammad Anwer Mallah and a plastic bag was recovered from his possession. It was opened, it contained one big piece and six small pieces of charas. Charas was weighed, it was 1030 grams. SIP Mehmood Akhtar Qureshi separated 10 grams of charas from the substance as sample for sending to the chemical examiner for its analysis and the remaining property was sealed. Mashirnama of arrest and

recovery was prepared in presence of the mashirs H.C Ali Nawaz and DPC Ghulam Shabeer. SIP Mehmood Akhtar Qureshi further deposed that he had taken personal search of accused and cash of Rs.3,100/- was recovered from his possession. Thereafter, accused and case property were brought to the police station, where he lodged FIR against the accused on behalf of State under Section 9(c) of CNS Act, 1997. In the cross-examination, SIP Mehmood Akhtar Qureshi has admitted that there is no initial/signature at roznamcha entries Nos.52 and 15. He has admitted that he has not produced original roznamcha entries in the evidence. He has also admitted that the place, where he had received spy information, was thickly populated area. He has also admitted that he did not associate private persons from the place, where he received spy information. He has admitted that the charas was weighed by him and he sent sample to the chemical examiner on 02.04.2013 for analysis. It is also admitted by him that he has not specifically mentioned that FIR as well as mashirnama of arrest and recovery that mashirs had put their signatures at the sealed parcel. He has shown ignorance about the news item published in Daily Kawish, Hyderabad dated 31.03.2013. He has also shown ignorance about the direct complaint was filed by Muhammad Soomar against him. H.C Ali Nawaz has supported the evidence of SIP Mehmood Akhtar Qureshi regarding the recovery of charas from the possession of the accused and stated that he was made as mashir. In the cross-examination, he has admitted that it is not mentioned in the FIR as well as mashirnama of arrest

and recovery that the charas was sealed at the spot. He has also shown ignorance about the direct complaint filed against SIP Mehmood Akhtar Qureshi.

12. From the close scrutiny of the evidence, it transpired that the evidence of the police officials was not reliable for the reasons that it was the case of spy information and it was day time but SIP Mehmood Akhtar Qureshi had failed to call independent and respectable persons from the shrine of Pir Jhando to witness the recovery proceedings. We are unable to understand as to how accused Attan Mallah, who was accompanied with the present appellant, succeeded in running away from the police party, who were armed with sophisticated arms and ammunitions; it has also created doubt in the prosecution case. Investigating Officer has admitted that there are no signatures or initials at roznamcha entries Nos.52 and 15. He has also admitted that he has not produced original roznamcha entries in the evidence. It has also been admitted that place of the recovery of charas is thickly populated area. Investigating Officer has stated that the charas was recovered from the possession of the accused on 30.03.2013 but it was sent to the chemical examiner on 02.04.2013 for chemical analysis. SIP Mehmood Akhtar Qureshi in his evidence has not mentioned that the charas was in safe custody for the period in between date of recovery and date of dispatch to the chemical examiner. Learned Advocate for the appellant has raised contention that there was tampering with the case property at

Police *Malkhana*. There is also another infirmity in the prosecution case that SIP has admitted that there is no specific mention in the mashirnama of arrest and recovery that the charas was sealed at the spot. It is matter of the record that direct complaint has been filed by one Muhammad Soomar against SIP Mehmood Akhtar Qureshi and it was pending before the Additional Sessions Judge, Tando Muhammad Khan but this fact has been suppressed by the SIP. Evidence of SIP has been contradicted by mashir on so many particulars of the case, particularly, with regard to the recovery proceedings. Accused since beginning has raised specific plea that he has been involved falsely and the charas has been foisted upon him because his close relative namely Muhammad Soomar had filed direct complaint against SIP Mehmood Akhtar Qureshi before the Additional Sessions Judge, Tando Muhammad Khan. Copy of direct complaint No.05/2013 has been produced in evidence. In view of defects in the prosecution case and keeping in view the defence plea, it would be unsafe to rely upon the evidence of police officials, without independent corroboration, which is lacking in this case. It is settled law that a single circumstance, which creates doubt in the prosecution is sufficient to extend the benefit of doubt to the accused. In this case there are several circumstances, which create doubt in the prosecution case. In this respect, reliance has been placed upon the case of *Khalil Ahmed V/s. The State (PLD 2008 Karachi 8)*.

13. 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)*.

14. For the above stated reasons, we have no hesitation to hold that the prosecution has failed to prove its case against the appellant beyond shadow of doubt. Trial Court did not appreciate the evidence according to the settled principles of law. In view of above infirmities, the case of the prosecution is highly doubtful. Consequently, appeal in hand is allowed. Conviction and sentence recorded by the Trial Court vide judgment dated 29.05.2014 are set aside. Appellant is present on bail, his bail bond stands cancelled and surety is hereby discharged. These are the reasons for our short order dated 05.04.2017 announced in open Court.

JUDGE

JUDGE