

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Appeal No.D-212 of 2007

PRESENT

Mr. Justice Naimatullah Phulpoto

Mr. Justice Rasheed Ahmed Soomro

Date of Hearing: 21.03.2017
Date of Judgment: 21.03.2017
Appellant/accused: Through Mr. Muhammad Yousuf Laghari, Advocate
The State: Through Syed Meeral Shah Bukhari, Deputy Prosecutor General, Sindh.

JUDGMENT

NAIMATULLAH PHULPOTO, J:- Appellant Gul Khan was tried by learned Special Judge, CNS, Sanghar in Special Case No.18 of 2006 for the offence under Section 9(b) of Control of Narcotic Substances Act, 1997. By judgment dated 02.10.2007, the appellant was convicted under Section 9(b) of Control of Narcotic Substances Act, 1997 and sentenced to suffer 02 years R.I and to pay a fine of Rs.5,000/-, in default whereof the appellant shall suffer R.I for one month more. 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 12.05.2006 at 1315 hours, complainant SIP Mian Hussain Ahmed of P.S Jhol left the Police Station alongwith subordinate staff ASI Atta Muhiuddin Jat, H.C Abdullah, Constables Ismail and Sadar Baig in government vehicle vide

roznamcha entry No.6 for patrolling, while patrolling in different places, they reached at Rana Check Post at Tando Adam Road, , they received spy information that accused Gul Khan Mari and Jan Ali Mari are selling charas at Rahimabad Bus Stop. Having received such spy information, the police party proceeded to the pointed place, where they saw two persons named above, who on seeing the police mobile tried to run away towards Jungle, then the police party chased them and caught-hold accused Gul Khan, while accused Jan Ali succeeded to run away by throwing one plastic bag on the ground, it was secured by the police party, it contained a slab of charas. On inquiry apprehended accused disclosed his name as Gul Khan, he disclosed name of co-accused as Jan Ali Mari. During search, one plastic bag was secured, it contained four big and small pieces of charas, one knife from the pocket and two currency notes of Rs.140/-. The charas recovered from accused Gul Khan became 110 grams, out of it police party separated 10 grams for chemical analysis and the remaining recovered charas, knife and currency notes sealed separately, while the charas thrown from running away accused became 200 grams, out of which the police party also separated 10 grams for sending it to chemical examiner for analysis and the remaining charas sealed separately. Mashirnama of arrest was prepared in presence of Mashirs ASI Atta Muhiuddin and Constable Muhammad Ismail. Thereafter, the arrested accused alongwith 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.18/2006 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. Samples of charas were sent to the chemical examiner 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 by showing accused Jan Ali as absconder.

4. Trial Court framed the charge against the accused under Section 9(b) of CNS Act, 1997, in which the accused pleaded not guilty and claimed to be tried.

5. Prosecution in order to prove its case examined P.W-1/Mashir ASI Atta Muhiuddin at Ex-5, he produced mashirnama of arrest and recovery of accused at Ex-5/A, P.W-2/SIP Taswar Hussain Jatt at Ex-06, he produced FIR at Ex-6/A and P.W-3/Complainant SIP Mian Hussain Ahmed at Ex-7, he produced roznamcha entry and chemical report at Exs-7/A to 7/B. Thereafter, the prosecution closed its side vide statement at Ex-8.

6. Statement of accused under Section 342 Cr.P.C was recorded at Ex-9, wherein the accused denied the allegations of 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 assessment of the evidence convicted and sentenced the appellant/accused as stated above.

7. Learned Advocate for the appellant mainly contended that the prosecution case is highly doubtful. According to the prosecution case, accused Jan Ali succeeded in running away, whereas appellant/accused was apprehended by the Police. It is further contended that as per evidence of the prosecution witnesses, 10 grams of charas were separated from 04 pieces but according to the report of the chemical examiner, only 10 grams were sent for chemical analysis. It is also argued that the Police had secured the charas from the present appellant/accused and absconding accused but the parcels produced before the Trial Court had no mark of identification. It is further argued that it was daylight incident and the Police party had spy information but the persons of the locality were not associated to act as mashir in this case. Counsel for the appellant has argued that according to the prosecution case, the absconding accused threw plastic bag and ran away and from the possession of the present accused charas was recovered but joint mashirnama has been prepared, which is inadmissible in evidence. It is further argued that there are material contradictions in the evidence of the prosecution witnesses with regard to the route adopted by the police officials at the time of patrolling and arrest of the accused. Counsel for the appellant further contended that ASI has stated that he prepared the mashirnama, while mashir has stated that he has prepared the

mashirnama. Counsel for the appellant pointed out that there was delay of 10 days in sending the charas to the chemical examiner and such delay has not been explained by the prosecution. Lastly, it is pointed out that there is over-writing in the date of arrest of the accused and argued that the prosecution has failed to prove its case against the appellant beyond shadow of doubt.

8. Syed Meeral Shah Bukhari, learned D.P.G has argued that all the police officials have fully supported the case of the prosecution, However, he conceded that there is over-writing in the date of arrest of the accused. However, he supported the impugned judgment.

9. 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 02.10.2007, therefore, the same may not be reproduced here, so as to avoid duplication and unnecessary repetition.

10. We have carefully heard the learned Counsel for the parties and perused the entire record. Record reflected that it was the case of spy information. The police officials had sufficient time to collect independent and respectable persons of the locality to witness the recovery proceedings but it has not been done in this case. The complainant ASI has replied in cross-examination that he made no efforts to call the private persons of the locality. It has been rightly pointed out that according to the case of the prosecution, 04 pieces of charas were recovered from the

possession of the accused weighing 110 grams and 10 grams were separated from each piece but as per report of the chemical examiner, he had received only 10 grams of charas, for which the prosecution has no explanation. Some material contradictions in the evidence of the prosecution witnesses, with regard to the route adopted by the police officials, while leaving the police station and reaching at the place and arrest of the accused, have also been pointed out. The original departure/arrival entries have also not been given by the prosecution for the satisfaction of the Court. It is the case of the prosecution that the present accused was standing with absconding accused namely Jan Ali. It is unbelievable that the Police caught-hold the present appellant and the absconding accused succeeded in running away, though police party was armed with official arms and ammunitions and it was daytime. Over-writing in the date of arrest of the accused is also evident on record. It is also fact that according to the prosecution case, the absconding accused threw the plastic bag and ran away and the present accused was arrested by the Police at some distance, in spite of that joint mashirnama of recovery has been prepared, it has created doubts in the prosecution case. Inordinate delay in sending the samples of charas to the chemical examiner in the background of the plea of the accused that he has been implicated in this case falsely due to enmity creates doubt. In such circumstances, positive report of the chemical examiner would not improve the case of the prosecution. It is the matter of the record that the accused was arrested from thickly populated area. 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. 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 under Section 9 of the Act is proved. Therefore, the provisions of the said Act have to be construed very strictly. In the circumstances, the recovery made by police officials is doubtful. Conviction cannot be based on such type of evidence of police officials, without independent corroboration, which is lacking in this case. 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.”

11. 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)*.

12. For the above stated reasons, we have come to the conclusion that prosecution case is highly doubtful, therefore, appeal is allowed. Consequently, conviction and sentence recorded by the Trial Court vide judgment dated 02.10.2007 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 21.03.2017 announced in open Court.

JUDGE

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