

IN THE HIGH COURT OF SINDH CIRCUIT COURT HYDERABAD

Cr. Appeal No.D-137 of 2017

PRESENT:

Mr. Justice Naimatullah Phulpoto

Mr. Justice Shamsuddin Abbasi

Date of Hearing: 21.03.2018

Date of Judgment: 21.03.2018

*Appellant/accused: Bakhtiar Ali Mari S/o Shah Muhammad
through Mr. Altaf Hussain Chandio,
Advocate.*

*The State: Through Syed Meeral Shah Bukhari,
Additional Prosecutor General, Sindh.*

J U D G M E N T

SHAMSUDDIN ABBASI, J:- Appellant Bakhtiar Ali Mari

faced trial before the Court of Special Judge (NARCOTICS), Shaheed Benazirabad in Special Narcotic Case No.532 of 2016, arising out of Crime No.116 of 2016, registered at P.S B-Section, Nawabshah, for offence punishable under Section 9(c) of Control of Narcotic Substances Act, 1997. The appellant was convicted and sentenced to suffer Rigorous Imprisonment for 07 years and to pay a fine of Rs.20,000/- and in default of payment of fine to further undergo Simple Imprisonment for 06 months. Benefit of Section 382-B Cr.P.C. was extended to the appellant.

2. The brief facts of the prosecution case are that on 14.09.2016, complainant / SIP Muhammad Iqbal Wassan, SHO P.S B-Section,

Nawabshah, alongwith his subordinate staff, namely ASI Manzoor, PCs Ali Gul Khaskheli, Jumo, Muhammad Rafique, Ali Gul Chandio and DPC Muhabbat Ali, left Police station at 1645 hours for patrolling of the area, vide roznamcha entry No.15. Having patrolled, they received spy information that one Bakhtiar Ali, originally resident of Jam Nando Mari, District Sanghar, being absconder in cases Crime No.55 of 2010 under Section 17(3) Hudood Ordinance and Crime No.41 of 2013, under Section 365-A PPC of P.S Peero Mal, District Sanghar, was present at Chore mori sui gas stop link road, having black colour shopper, who was waiting for transport. Upon receiving such spy information, the police party reached at the pointed place at 1815 hours and saw one person standing there with black colour shopper, who on seeing the police party tried to run away but was apprehended by the police party alongwith shopper. As there was non-availability of private persons, the complainant / SIP Muhammad Iqbal Wassan nominated ASI Manzoor and PC Ali Gul Khaskheli as Mashirs and inquired from the apprehended person, who disclosed his name as Bakhtiar Ali S/o Shah Muhammad Mari, resident of Jam Nando Mari, District Sanghar, and at present Airport Colony, Nawabshah. The complainant possessed shopper from the accused, which was opened and it contained 10 big pieces of chars, which on weighing became 5000 grams and from personal search of the accused, Rs.850/- were also recovered from him. Complainant / SIP Muhammad Iqbal Wassan sealed the property in presence of the mashirs and prepared such mashirnama of arrest and recovery of chars at the spot. Thereafter, the accused and case property were brought to P.S, where the complainant / SIP Muhammad Iqbal Wassan lodged FIR of the incident against the accused on behalf of the State vide Crime No.116 of 2016.

3. SIP Muhammad Iqbal Wassan conducted himself the investigation of the case and recorded statements of P.Ws / Mashirs under Section 161 Cr.P.C, he visited at the place of incident and prepared mashirnama of place of incident. The complainant / I.O also sent the case property to the chemical examiner and after receiving such positive report and completing other formalities he submitted challan before learned trial Court.

4. The learned trial Court framed the charge against the accused for offence under Section 9(c) of CNS Act, 1997 at Ex-2, but the accused did not plead guilty and claimed to be tried.

5. In order to prove the case, the prosecution had examined P.W-1 SIP Muhammad Iqbal Wassan, who is complainant and I.O of the case at Ex-3. He has produced mashirnama of arrest and recovery at Ex-3/A, copy of FIR at Ex-3/B, attested copies of roznamcha entries No.24 and 15 at Exs-3/C & 3/D respectively, report of chemical examiner at Ex-3/E. The prosecution also examined P.W-02 ASI Manzoor Ali being mashir of the case at Ex-4 and PC Lutuf Ali Wagan at Ex-5. Thereafter, prosecution closed the side.

6. The learned trial Court recorded the statement of accused under Section 342 Cr.P.C at Ex-7, in which accused denied the allegations leveled by the prosecution. Accused did not examine himself on oath nor led any evidence in his defence.

7. The learned trial Court after hearing learned Counsel for parties and assessment of evidence by judgment dated 07.12.2017 convicted the accused under Section 9(c) of Control of Narcotic Substances Act, 1997 and sentenced him as referred supra at paragraph No.1.

8. Being aggrieved and dissatisfied from the said judgment, the appellant / accused preferred the present appeal.

9. The learned Counsel for the appellant contended that both the mashirs of the case are subordinate staff of the complainant and the complainant had himself conducted investigation in this case. He further contended that there was delay in sending chars to the chemical examiner and no plausible explanation has been furnished by the prosecution. It is further contended that safe custody of recovered chars has not been established. He also contended that mashirnama of recovery and arrest at Ex-3/A shows that ASI Manzoor Ali Bhangwar and PC Ali Gohar Khokhar were cited mashirs of the recovery and arrest but the name of Ali Gohar Khokhar has not been mentioned in departure entry as well as FIR. Learned Counsel further contended that even complainant SIP Muhammad Iqbal Wassan had not disclosed the name of PC Ali Gohar Khokhar in his evidence. He also contended that the appellant has been falsely implicated in this case. Lastly contended that accused was arrested about 15 days prior to lodging of this FIR and the police demanded Rs.200,000/- for his release but he could not pay the amount, therefore, he was involved in this case and finally he prayed for acquittal of the appellant.

10. On the other hand, the learned Additional Prosecutor General has contended that prosecution has proved it's case. However, learned A.P.G admitted that there was no evidence that after recovery of chars from the possession of the accused, it was kept in safe custody at *Malkhana* of Police Station for two days till that was transmitted to the chemical examiner for analysis. He further pointed out that examination-in-chief of three prosecution witnesses was recorded by the trial court in absence of

defence Counsel though the offence carries capital punishment and he further admitted that learned trial court has totally ignored the defence version / plea while passing the impugned judgment.

11. We have heard the learned Counsel for the appellant and learned Additional P.G for the State and perused the record minutely.

12. P.W No.1 SIP Muhammad Iqbal had deposed in his evidence that he left P.S at 1645 hours alongwith his subordinate staff ASI Manzoor Ali Bhangwar, PCs Ali Gul Khaskheli, Jumo, Muhammad Rafique, Ali Gul Chandio, duly armed with official weapons on Police Mobile No.SP-771 alongwith driver PC Muhabbat Ali for patrolling in the area. During patrolling, SIP Muhammad Iqbal had received spy information that one Bakhtiar Ali, who was absconder in cases bearing Crime No.55 of 2010 under Section 17(3) Offence Against Property (Enforcement of Hudood Ordinance) 1979 and in Crime No.41 of 2013, under Section 365-A PPC of P.S Peero Mal, District Sanghar, was available at Chore mori sui gas stop link road, having black coloured shopper in his hand, waiting for transport. On receiving such spy information, the complainant with his subordinate staff proceeded to pointed place where they saw a person standing there, having black coloured shopper in his hand and on seeing police party tried to flee away but police apprehended him alongwith shopper. Due to non-availability of private mashirs, SIP Muhammad Iqbal appointed ASI Manzoor Ali and PC Ali Gul Khaskheli as mashirs. On inquiry, the apprehended person disclosed his name as Bakhtiar Ali S/o Shah Muhammad Mari resident of Jam Nando Mari District Sanghar and presently resident of Airport Colony, Nawabshah. SIP Muhammad Iqbal took shopper from his hand, opened the same and found 10 big pieces of chars which became 05 kilograms in weight. On further personal search of

accused, the police recovered Rs.850/- from front pocket of shirt of the accused. SIP Muhammad Iqbal prepared such mashirnama of arrest of accused and recovery of chars in presence of mashirs and sealed the chars and brought the accused at P.S where the present FIR was lodged by SIP Muhammad Iqbal on behalf of the State. On the perusal of mashirnama of arrest and recovery as well as contents of the FIR, which reveals the same story as stated above. P.W No.2 ASI Manzoor Ali Bhangwar also deposed in same line as deposed by P.W No.1 SIP Muhammad Iqbal.

13. We have noticed that there are material contradictions in evidence of prosecution witnesses. As per FIR, roznamcha entry No.15 for departure from P.S and body of mashirnama of arrest and recovery reveals that police party was comprising of SIP Muhammad Iqbal, ASI Manzoor Ali Bhangwar, PCs Ali Gul Khaskheli, Jumo, Muhammad Rafique, Ali Gul Chandio and driver PC Muhabbat Ali and they apprehended the accused and recovered chars and prepared such mashirnama of arrest and recovery at the spot but we have noticed that 2nd mashir was cited PC Ali Gohar Khokhar, who signed the mashirnama as 2nd mashir but his name has neither been cited in FIR nor in roznamcha entry No.15 for departure from police station, even his name has not been mentioned in the body of mashirnama of arrest and recovery. This fact has been admitted by P.W No.2 ASI Manzoor Ali Bhangwar in his deposition that *"It is correct to suggest that name of Ali Gohar Khokhar is not shown in FIR or in contents of mashirnama"*

14. Other material contradiction came on surface, complainant SIP Muhammad Iqbal has stated in his evidence that he had sealed the entire recovered chars at spot. Whereas, mashir / ASI Manzoor Ali has deposed

that he had sealed the case property at spot. It is the matter of the record that complainant has stated that he had received spy information about the presence of accused at Kenchi Pull that accused was present at the chore more despite the complainant failed to associate any independent person to witness the alleged recovery.

15. We have also observed with deep concern that offence under Section 9(c) of CNS Act carries capital punishment despite of the fact that the learned trial Court had recorded examination-in-chief of P.Ws in absence of the Counsel of accused and cross was reserved on the request of the accused. Procedure for recording evidence of P.Ws in offences of capital punishment in absence of defence Counsel is not warranted in law.

16. The prosecution has also failed to explain about safe custody of the recovered chars as the alleged recovery of chars was effected on 14.09.2016 and the same was received by the chemical examiner on 16.09.2016. The prosecution has also failed to produce any documentary evidence to establish that the case property was kept at *Malkhana* in safe custody for two days, even they failed to produce any entry of *Malkhana*. No doubt the police officials are as good witnesses as any other private witness unless the defence proves that the same police officials have bias or enmity with the accused. We have also observed a number of infirmities and material contradictions in the prosecution evidence, which cut the roots of prosecution case. In such circumstances, it would be unsafe to rely upon the evidence of police officials without independent corroboration, which is absolutely lacking in this case.

17. Apart from the above, the learned Counsel for the appellant has rightly contended that safe custody of chars at the *Malkhana* and it's transit

to the chemical examiner in between the period from 14.09.2016 to 16.09.2016 have not been established in order to prove the guilt of the accused. We are also of the considered view that safe custody of chars and it's transit to the chemical examiner have not been proved by cogent and confidence inspiring evidence. In this regard, we have much relied upon the dictum laid down by the august Supreme Court in the case of IKRAMULLAH & OTHERS V/S. THE STATE, reported as 2015 SCMR 1002, wherein, it has been observed as under:-

“5. In the case in hand not only the report submitted by the Chemical Examiner was legally laconic but safe custody of the recovered substance as well as safe transmission of the separated samples to the office of the Chemical Examiner had also not been established by the prosecution. It is not disputed that the investigating officer appearing before the learned trial court had failed to even to mention the name of the police official who had taken the samples to the office of the Chemical Examiner and admittedly no such police official had been produced before the learned trial Court to depose about safe custody of the samples entrusted to him for being deposited in the office of the Chemical Examiner. In this view of the matter the prosecution had not been able to establish that after the alleged recovery the substance so recovered was either kept in safe custody or that the samples taken from the recovered substance had safely been transmitted to the office of the Chemical Examiner without the same being tampered with or replaced while in transit.”

18. Needless to mention that in criminal cases the burden to prove the case rests entirely on the prosecution. The prosecution is duty bound to prove the case against the accused beyond reasonable doubt and this duty does not change or vary in the case in which no defence plea is taken by the accused. The defence plea is always to be considered in

juxtaposition with the prosecution case and in the final analysis if the defence plea is proved or accepted, then the prosecution case would stand discredited and if the defence is substantial to the extent of creating doubt in the credibility of the prosecution case then in that case it would be enough but it may be mentioned here that in case the defence is not established at all, no benefit would occur to the prosecution on that account and it's duty to prove it's case beyond reasonable doubt would not diminish even if the defence plea is not proved or found to be false, thus, we are of the opinion that the prosecution has failed to discharge it's liability of proving the guilt of the appellant / accused beyond shadow of doubt.

19. Having gone through the above evidence of the police officials, we have no hesitation to say that there are number of infirmities and lacunas in the prosecution case as highlighted above. In this respect, the Honourable Supreme Court of Pakistan in the case of TARIQ PERVEZ V/S. THE STATE, reported as 1995 SCMR 1345, has observed that *"it is not necessary that there should be many circumstances creating doubts. If there is a single circumstance, which creates reasonable doubt in a prudent mind about the guilt of any accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right."*

20. Having prudently explained as above, we have come to the conclusion that the prosecution has failed to prove it's case against the appellant beyond reasonable doubt. We, therefore, by extending benefit of doubt, allow this appeal and the impugned judgment passed by the learned trial Court is *set-aside*. The appellant, who is

confined in jail, is ordered to be released forthwith, if he is not required in any other custody case.

21. These are the reasons of our short dated 21.03.2018.

JUDGE

JUDGE

Shahid