

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD**  
**Cr. Appeal No.D-19 of 2018**

**PRESENT**

*Mr. Justice Naimatullah Phulpoto*  
*Mr. Justice Shamsuddin Abbasi*

*Date of Hearing:* 02.04.2018  
*Date of Judgment:* 02.04.2018  
*Appellant/accused:* Through Mr. Imtiaz Ali Chanhio,  
Advocate  
*The State:* Through Shahzado Salim Nahyoon,  
D.P.G for the State.

**J U D G M E N T**

**NAIMATULLAH PHULPOTO, J:-** Appellant Talat Mehmood was tried by learned 3<sup>rd</sup> Additional Sessions Judge / Special Judge CNS Hyderabad for offence u/s 9(c) Control of Narcotics Substance Act, 1997. Vide judgment dated 27.01.2018, Appellant was convicted u/s 9(c) Control of Narcotics Substance Act, 1997 and sentenced to 04 years' R.I and to pay fine of Rs.20,000/-, in case of default in payment of fine, appellant/accused was ordered to suffer one month's R.I more. Appellant was extended benefit of 382-B Cr.P.C.

2. Brief facts of the prosecution case as per F.I.R. are that on 05.04.2017 at 1800 hours a police party of P.S Makki Shah Hyderabad headed by SIP Abdul Karim Chachar left Police Station for patrolling. On the spy information police party proceeded to the Cantonment Graveyard where police party saw that two persons were standing alongwith one motorcycle. SIP recovered plastic

shopper from the possession of the present appellant and it contained six big and small pieces of charas. The charas was weighed. It became 1020 grams. Due to non availability of the private persons, police constables namely PC Rashid Baig and PC Farhanullah Khan were made as mashirs of arrest and recovery. Another accused who was standing alongwith Talat Mehmood was also arrested and from his possession 120 grams heroin powder was recovered. Charas and Heroin were sealed on the spot. Both accused were arrested and thereafter both accused and case property were brought at Police Station where separate F.I.R. bearing Crime No.24/2017 was registered against accused Talat Mehmood under section 9(c) Control of Narcotics Substances Act, 1997, whereas, F.I.R. bearing Crime No.25 of 2017 was registered under section 9(b), Control of Narcotics Substances Act, 1997 against accused Azhar Ali, on behalf of the State. During investigation 1020 grams charas was sent to the Chemical Examiner by the Investigating Officer through P.C Muhammad Yousuf for analysis. Positive report was received. On the conclusion of the investigation, the challan was submitted against the accused for offences under Section 9(c) of Control of Narcotic Substance, 1997.

3. Trial court framed charge against accused under Section 9(c) of Control of Narcotics Substances Act, 1997 at Ex-03. The accused pleaded not guilty and claimed to be tried.

4. In order to substantiate the charge, prosecution examined P.W-1 SIP Abdul Karim Chachar at Ex-05. He produced memo of arrest and recovery, F.I.R. bearing Crime No.24/2017, departure and arrival entries, entry No.21, entry No.19, criminal record of accused, letter to chemical analyzer and chemical analyzer's report at Ex.5/A to Ex.5/I. Mashir P.W-2 PC Mirza Rashid Baig was examined at Ex.6. Thereafter, prosecution closed its side vide Ex.7.

5. The statement of accused was also recorded under Section 342 Cr.P.C at Ex-08 in which he claimed his false implication in this case and denied the prosecution case. Accused raised plea that the charas has been foisted upon him and report of chemical examiner has been managed. It was further stated that the P.Ws are police officials and they are interested. Accused declined to examine himself on oath in disproof of the allegation. However, he has examined in defense D.W Muhammad Shamshad at Ex.9.

6. Trial Court on the conclusion of the trial after hearing the learned Counsel for the parties and deep scrutiny of the evidence, by judgment dated 27.01.2018 convicted the accused and sentenced as stated above. Hence, accused has filed the present appeal.

7. Mr. Imtiaz Ali Chanhio, Advocate for appellant contended has mainly contended that it was the case of spy

information and the police had sufficient time to call the private persons of the locality to witness the recovery proceedings but complainant / Investigating Officer did not bother to call the independent persons. It is further contended that the safe custody of the charas at Malkhana of Police Station and its safe transit to the Chemical Examiner has not been proved by the prosecution in the evidence. It is further contended that according to the case of prosecution charas was dispatched to the Chemical Examiner through P.C Muhammad Yousuf, who has not been examined by the prosecution to justify the safe transit to the Chemical Examiner. It is also contended that there is delay of 05 days in sending the charas to the Chemical Examiner. Counsel for the appellant submits that tampering with the case property could not be ruled out. Counsel for the appellant has also drawn attention of the court to the report of the Chemical Examiner in which it is mentioned that parcel containing black colour plastic shopper contains six greenish brown semi soft different sizes pieces with smell of charas. Learned counsel for the appellant submits that according to the case of prosecution six small and pig pieces of charas were recovered from the appellant. Lastly it is contended that appellant has been involved in this case falsely at the instance of one Tor Khan. In support of his contention he relied upon the cases of *TARIQ PERVEZ V/S. THE STATE* (1995 SCMR 1345), and *IKRAMULLAH & OTHERS V/S. THE STATE* (2015 SCMR 1002).

8. Shahzado Salim Nahyoon, D.P.G for the State argued that the prosecution witnesses had no enmity with the appellant to involve him falsely in this case. However, he conceded that there is delay of 05 days in sending the charas to Chemical Examiner. He has admitted that there is no evidence with regard to safe custody at Police Station and its safe transit to the Chemical Examiner. He has also admitted that there is contradiction with regard to the number of pieces of charas in the mashirnama or arrest and recovery as well as in the report of the Chemical Examiner.

9. After hearing the learned Counsel for the parties we have scanned the entire evidence. SIP Abdul Karim of P.S Makki has deposed that he left Police Station alongwith his subordinate staff on 05.04.2017 for patrolling when the police party reached at Tehrani Chow, where he received spy information that appellant alongwith his companion was selling charas / heroin near Cantt. graveyard. Police party proceeded towards pointed place and reached there at 1800 hours where saw two persons standing there and motorcycle was parked beside them. They tried to run away, however, police could catch them hold. Due to non availability of the private mashirs SIP Abdul Karim made Police Constables as mashirs and made personal search of accused Talat Mehmood. During search it is alleged that a plastic shopper was recovered from his possession containing six pieces of charas small and big. From another accused, who disclosed his name Azhar Ali, heroin power weighing 120 grams was recovered.

Motorcycle was also seized under section 550 Cr.P.C. Joint mashirnama was prepared in presence of the mashirs namely PC Rashid and PC Farhan. Thereafter both accused and case property were brought at Police Station where F.I.R. bearing Crime No.24/2017 was registered against the appellant under section 9(c) Control of Narcotics Substances Act, 1997 and F.I.R. against co-accused Azhar Ali was recorded bearing Crime No.25/2017 under section 9(b) Control of Narcotics Substances Act, 1997. Charas recovered from the possession of appellant was dispatched to the Chemical Examiner through P.C Muhammad Yousuf and positive report was received. In the cross examination, above named complainant has denied the suggestions that appellant has been involved in this case falsely at the instance of Tor Khan. Mashir P.W-2 PC Mirza Rashid Baig has supported the version of the complainant and stated that he acted as mashir in this case. He was also cross examined and he denied that the charas has been foisted upon the accused.

10. From the close scrutiny of the evidence, we have come to the conclusion that the prosecution has failed to establish its case against the appellant. It was the case of spy information and it was day time. We are unable to understand as to why complainant / Investigating Officer failed to call the independent persons of the locality to make them as mashirs of the recovery and arrest in this case. Moreover, prosecution has failed to bring on record the evidence regarding safe custody of the charas at Police Station

and its safe transit to the Chemical Examiner. Prosecution has failed to examine WHC of the Police Station to establish the safe custody of the charas at Police Station. Even PC Muhammad Yousuf, who had taken the charas to the Chemical Examiner, has also not been examined by the prosecution. It is evident from the report of the Chemical Examiner that there was delay of 05 days in sending the charas to the Chemical Examiner. The delay in dispatch of the charas to the Chemical Examiner has not been explained by the prosecution. It is contended that there was tampering with the case property and in these circumstances, delay would be fatal to the prosecution case. It would be unsafe to believe prosecution evidence in respect of present appellant without independent corroboration, which is lacking in this case. On the point of safe custody of charas and its safe transit, the counsel has rightly relied upon the case of IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002), the relevant portion is reproduced hereunder:-

***“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.”***

11. Moreover, we have noticed that in the mashirnama of arrest and recovery it is mentioned that six small and big pieces of charas were recovered from the possession of the appellant / accused but the Chemical Examiner's report produced before the trial court at Ex.5/l reflects that parcel containing black colour plastic shopper contains six greenish brown semi soft different sizes pieces, which is contrary to the description of the charas given in the mashirnama of arrest and recovery.

12. In our considered view, prosecution has failed to prove that the charas was in safe custody for the aforementioned period. Even positive report of the chemical examiner would not prove the case of prosecution. There are also several circumstances which created doubt in the prosecution case. It is settled law that it is not necessary that there should many circumstances creating doubts. If there is a single 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. In the case of Tariq Pervez (supra), the Honourable Supreme Court has observed as follows:-

***“It is settled law that it is not necessary that there should many circumstances creating doubts. If there is a single 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.”***

13. Rightly, reliance has been placed upon the cases of Ikramullah and Tariq Pervez (supra) with regard to the safe



custody of case property at P.S and its safe transit to the Chemical Examiner as well as regarding benefit of doubt.

14. We have no hesitation to hold that the prosecution has failed to prove its case against the accused. We, therefore, extending benefit of doubt to appellant / accused Talat Mehmood allow Cr. Appeal No.D-19/2018. Conviction and sentence recorded against the appellant by the learned Illrd Additional Sessions Judge / Special Judge, under Control of Narcotics Substances Act Hyderabad vide judgment dated 27.01.2018 are set-aside. Appellant Talat Mehmood son of Muhammad Rafique shall be released in Crime No.24/2017 of P.S Makki Shah registered under section 9(c), Control of Narcotics Substances Act, 1997, if he is not required in any other case.

JUDGE

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