

# IN THE HIGH COURT OF SINDH CIRCUIT COURT HYDERABAD

*Cr. Appeal No.D-130 of 2017*

**PRESENT:**

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

*Date of Hearing: 17.04.2018*

*Date of Judgment: 17.05.2018*

*Appellant/accused: Nazar Muhammad @ Nazroo S/o Rawat  
Rind, through Mr. Mumtaz Alam Leghari,  
Advocate.*

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

## **JUDGMENT**

**SHAMSUDDIN ABBASI, J.-**

Through this judgment,

we intend to dispose of the instant appeal filed by appellant Nazar Muhammad @ Nazroo, impugning the judgment dated 20.11.2017, passed by learned Special Judge (Narcotics) Shaheed Benazirabad in Special Narcotic Case No.503 of 2016, arising out of Crime No.148 of 2016, registered at P.S Sakrand, under Section 9(c) of Control of Narcotic Substances Act, 1997, whereby the appellant was convicted and sentenced to undergo 05 years R.I and to pay fine of Rs.10,000/-, in case of default in payment of fine, to further undergo S.I for 06 months. However, the benefit of Section 382-B Cr.P.C. was extended to the appellant.

2. The brief facts as narrated in the FIR are that the complainant SIP Asghar Ali Awan alongwith subordinate staff namely ASI Ali Bux, PCs Amanullah, Raj Muhammad, Javed and DPC Wajid Mehmood left Police Station on 04.09.2016 at about 1900 hours for patrolling duty in the area vide roznamcha entry No.26. While patrolling in the area, they received spy information that absconder accused Nazar Muhamamd @ Nazroo Rind in Crime Nos.237/2014, 05/2015, 61/2015, 31/2016, 43/2016, 63/2016, 967/2016, 117/2016 and 116/2016 is selling chars at his otaq, situated in village Khan Muhammad Rind. After receiving such spy information, the police party reached there at 2030 hours, where they saw the present accused sitting on cot, who while seeing the police party tried to run away alongwith a shopper but was apprehended by the complainant alongwith the said shopper. On inquiry, he disclosed his name as Nazar Muhammad @ Nazroo S/o Rawat Rind, resident of Village Khan Muhammad Rind, Taluka Sakrand. The complainant opened the shopper, wherefrom 08 big and 01 small pieces of chars were secured, which was weighed, it became 4.250 kilograms. Due to non-availability of private persons on the spot, the complainant nominated ASI Ali Bux and PC Amanullah as Mashirs of the arrest and recovery. On further search of the accused, Rs.520/- were also recovered from side pocket of his shirt. Mashirnama of arrest and recovery was prepared in presence of the Mashirs. Thereafter, the accused and the case property were brought to the Police Station, where the present case being FIR No.48 of 2016 was registered against the accused on behalf of the Sate.

3. The complainant / SIP Asghar Ali Awan conducted the investigation of the case himself and recorded statements of P.Ws / Mashirs under Section 161 Cr.P.C, He being I.O sent the case property to

the chemical examiner for analysis and after receiving positive report and completing all the formalities, he submitted challan against the accused before the competent Court of Law.

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

5. In order to prove the above charge, the prosecution examined P.W-1 ASI Ali Bux Magsi at Ex-3, who produced mashirnama of arrest and recovery at Ex-3/A. P.W-2 Complainant / SIP Asghar Ali Awan was examined at Ex-4, who produced FIR at Ex-4/A, attested photocopies of roznamcha entries No.26 and 28 at Ex-4/B & 4/C, memo of wardat at Ex-4/D, chemical examiner's report at Ex-4/E, photocopies of FIRs against accused at Exs-4/F/1 to 4-F/10. P.W-3 PC Ghulam Rasool Jamali was examined at Ex-5, who produced photocopy of receipt RC at Ex-5/A. Thereafter, the prosecution closed it's side.

6. The learned trial Court recorded the statement of accused under Section 342 Cr.P.C at Ex-7, in which the accused denied the allegations leveled against him by the prosecution. Accused neither examined himself on oath nor led any evidence in his defense.

7. The learned trial Court after hearing learned Counsel for parties examining the evidence, vide judgment dated 20.11.2017, convicted the accused under Section 9(c) of Control of Narcotic Substances Act, 1997, and sentenced him as stated / referred to above.

8. Being aggrieved and dissatisfied by the said judgment, the appellant / accused preferred the instant appeal.

9. The learned Counsel for the appellant has contended that the appellant has been involved in this case falsely by the complainant and the learned trial Court without discussing the contradictions in the evidence of the prosecution witnesses has passed the judgment, which is against the principles of natural justice. He further contended that the complainant has mentioned various points of place where police patrolled but the mashir has given different places of the patrolling. He further contended that there is delay of two days in sending the samples of chars to the chemical examiner to the extent that recovery of chars was made on 04.09.2016 but it was sent to the chemical examiner on 06.09.2016 and no evidence with regard to safe custody of chars at Malkahana has been brought on record by the prosecution. Learned Counsel further contended that the prosecution witnesses are police officials and at the time of recovery of chars no efforts were made by the police officials to associate private / independent person of the locality to witness the alleged recovery. He further submitted that appellant has been acquitted in the cases of the narcotics as referred by the complainant and copies of the judgments have been place on record. In support of his arguments, he has relied upon the cases reported as (i) 2015 SCRM 1002 (ii) 2016 SCMR 621 (iii) PLD 2009 Karachi 191 (iv) 2017 YLR 712 (v) 2016 P.Cr.L.J Note 79 and (vi) P.Cr.L.J 1430.

10. On the other hand, the learned A.P.G has supported the judgment of the learned trial Court by arguing that the prosecution evidence is reliable, believable and trustworthy and that the learned trial Court has rightly convicted the appellant / accused for the recovery of 4250 grams of chars from his possession. However, he admitted that there was delay of two days in sending chars to the chemical examiner and the prosecution

had not led any evidence with regard to safe custody of the recovered substance. Learned A.P.G, however, opposed the appeal.

11. Heard the learned Counsel for the appellant as well as learned A.P.G for the state and perused the material minutely.

12. In order to prove it's case, the prosecution has examined P.W-1 ASI Ali Bux, P.W-2 SIP Asghar Ali and P.W-3 PC Ghulam Rasool. At the foremost, we have examined P.W-1 ASI Ali Bux (Ex-03), who was first mashir of the case. He has stated in his evidence that on 04.09.2016 he was posed as ASI at P.S Sakrand. On the same day, he under the supervision of SIP Asghar Ali Awan, SHO P.S Sakran, PCs Amanullah, Raj Muhammad Pali, Javed Ahmed Dayo and PC Driver Wajid Mehmood duly armed with official weapons and uniform left P.S in a government mobile at 1900 hours for patrolling vide roznamcha entry No.26. After patrolling from different places, when they reached at Majeed Keerio Stop where they received spy information that accused Nazar Muhammad alias Nazroo Rind was selling chars at his otaaq, who was previously involved in the cases bearing Crime Nos.237/2014, 05/2015, 61/2015, 31/2015, 43/2016, 63/2016, 96/2016, 117/2016 and 116/2016 in different offences. On receipt of such information, they proceeded towards the pointed place and reached there at about 08:30 p.m. where they saw that accused was sitting at cot, who seeing the police party tried to run escape away by picking a shopper from the cot. They apprehended the accused and took shopper from the possession of accused. He further contended that SIP Asghar Ali Awan tried to collect the private mashirs but due to non-availability of private mashirs SIP cited him and PC Amanullah as mashirs and inquired the name from the accused on which he disclosed his name to be Nazar Muhammad alias Nazroo. Thereafter, SIP opened the shopper and found

eight big pieces of the chars lying in a shopping bag. The chars was weighed, which became 4000 grams and on personal search they also secured one black coloured plastic shopper from the fold of his shalwar, which was opened and found one piece of chars lying in it and the same was weighed at the spot, which became 250 grams. The total weight of recovered chars became 4250 grams. SIP Asghar Ali sealed the whole chars at the spot in presence of the mashirs and prepared mashirnama of arrest and recovery and got the signatures on it. SIP also secured two notes of Rs.100/-, four notes of Rs.50/-, five notes of Rs.20/- and two notes of Rs.10/- (Total Rs.520/-). He further contended that SIP Asghar Ali had prepared mashirnama of arrest and recovery on the head light of police mobile. Thereafter, the police party brought the accused and the recovered property at P.S where SIP Asghar Ali Awan recorded FIR under Section 9(c) of CNS Act, 1997 against the accused. He further stated that his 161 Cr.P.C statement was also recorded at P.S after registration of FIR. During the cross-examination, this prosecution witness has admitted that they received information about presence of the accused at Majeed Keerio Stop, where so many people were available. He further admitted that Majeed Keerio Stop is thickly populated area and situated at Sakrand Mehrab Road, which was very busy road. He admitted that they did not try to collect private mashirs from Majeed Keerio Stop, so also from the place of incident. He further admitted that police had not received any written complaint against the accused for selling of chars. He has also denied that the wife of accused was died on the day of incident and she had received firearm injuries at the hands of police and uncle of accused namely Alam Khan Rind had filed Direct Complaint No.21 of 2016 against the SHO / complainant Ali Asghar Awan and others in the Court of learned VIth

Additional Sessions Judge, Shaheed Benazirabad. He has also disclosed his awareness that accused Nazar Muhammad had been acquitted in Crime Nos.43/2016, 31/2016, 63/2016, 05/2015 and 61/2015. He further replied that they consumed 40 minutes in completing the formalities at the place of incident. He further admitted that the number of currency notes was not mentioned in the mashirnama as well as in the FIR. He has also denied that he was deposing falsely at the instance of complainant due to murder of wife of accused at the hands of police and such direct complaint against the police officials was pending trial.

13. We have also examined the evidence of P.W-2 SIP Asghar Ali Awan (Ex-4), who is I.O and complainant of the case. He has stated on the same line as stated by the aforesaid P.W-1 / Mashir of the case. However, he has stated that he has conducted investigation of the case. During the cross-examination, he has admitted that the people were available at the places where they patrolled and he further admitted that there were shops and hotels at Majeed Keerio Stop where they received spy information about selling of chars but he did not try to pick up any private person as mashir. He also disclosed his unawareness regarding acquittal of the accused from the cases bearing FIR Nos.237/2014, 05/2015, 31/2016, 43/2016 and 63/2016. He further admitted that he had not produced list during his evident, showing the present accused as absconder in those cases. He further admitted that they remained in the village of accused for about 30 / 40 hours. He further admitted that he had not obtained search warrants for entering into the otaq of the accused. He further admitted that at the time of arrest they did not find out any customer available in the otaq. He further admitted that they took about half an hour at the place of incident. He further admitted that he had not produced any certificate during

his evidence, showing that the property remained at Malkhana before sending it to the chemical examiner. He further admitted that the parcel was found with five seals and word Ninja in golden colour was written in all eight pieces of the chars. He further admitted that he had not written these words in the mashirnama. He also admitted that uncle of the present accused had lodged direct complaint on the allegation that on 25.07.2016 they fired upon the wife of the present accused and got injured her who subsequently died. He also denied that there was difference of handwriting between mashirnama of arrest and mashirnama of wardat. He also admitted that he made writing over sealed parcel at wardat except mentioning crime number, which was written by him at the police station.

14. Lastly, we have examined the evidence of P.W-3 PC Ghulam Rasool (Ex-5), who has stated that on 06.09.2016 sealed case property parcel of this case was handed over to him by the complainant / I.O of this case for depositing the same to the office of chemical examiner and on the same day he deposited the sealed parcel in the said office and obtained such receipt. During the cross-examination, he stated that the SHO had handed over him the parcel at 0700 hours and he found three seals affixed on the parcel. He had also not produced the roznamcha entry, which he had kept in roznamcha book before sending the case property to the chemical examiner. He further admitted that he had not disclosed about the number of such roznamcha entry in his statement under Section 161 Cr.P.C. He further stated that he reached at Rohri at the office of chemical examiner at 05:00 p.m. Thereafter, the prosecution after examining the above three witnesses closed it's side.

15. We have also examined the statement of accused recorded under Section 342 Cr.P.C, wherein he, when questioned that do you want



to say anything else, replied that I am innocent. On 25.07.2016 the police entered into his otaq and made straight firing upon them. Due to firing, his wife Mst. Bhamboo received firearm injuries. He further stated that he brought his injured wife to the hospital where she succumbed to the injuries during treatment. The police did not record his FIR, therefore, his father-in-law Alam Khan filed Direct Complaint No.21 of 2016, which is pending adjudication against SHO Ali Asghar Awan and other police officials in the Court of learned IVth Additional Sessions Judge, Shaheed Benazirabad. He further stated that the complainant booked him in this false case and he was arrested from the hospital during treatment of his wife. He further contended that the police pressurized them to withdraw the direct complaint filed against them for the murder of his wife and on their refusal the police lodged another FIR bearing No.117 of 2016 at P.S Sakrand, showing falsely that his deceased wife received injuries due to falling over peg. He further stated in his statement under Section 342 Cr.P.C that mashir of this case was complainant in that case bearing Crime No.117 of 2016. He further stated that he has been acquitted from six cases and he had produced copies of those six cases in which he had been acquitted by the trial Court and finally he produced photocopy of discharge card of his wife, showing firearm injuries upon her and he has also produced copy of application made by him to the Court from jail at Ex-7/H.

16. We have scanned the evidence of P.W-1 / Mashir Ali Bux and P.W-2 / I.O SIP Asghar Ali and P.W-3 / PC Ghulam Rasool and observed that the alleged chars was shown to have been recovered on 04.09.2016 but the said chars was sent to the chemical examiner on 06.09.2016 and the prosecution has miserably failed to produce any entry of Malkhana as well as statement of Incharge of Malkhana in order to establish the case

against the appellant, therefore, we have no hesitation to say that safe custody of the recovered chars has not be established by the prosecution. Prosecution was not able to establish that after alleged recovery of the chars, it was either kept in safe custody or that samples taken from recovered chars had safely been transmitted to the office of chemical examiner without tampering or replacing while samples were transmitted. On this crucial aspect of the case, the learned Counsel for the appellant has relied upon the case of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)*, wherein the Honourable Supreme Court has held 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.

17. In spite of the fact that this is the case of prior information, the complainant has out-rightly admitted that neither he asked to any private person to associate as mashir to witness the recovery proceedings, nor it was tried by him despite that there were so many people available at the places where the police party patrolled. There appears material contradiction in the evidence of the prosecution witnesses being; that according to mashir of recovery, the complainant has prepared mashirnama in the head light of police mobile, whereas, the complainant has stated that he had prepared mashirnama on torch light as well as on the head light of

police mobile but mashir did not disclose this fact that so far any torch has been used for preparation of mashirnama of arrest and recovery. Even otherwise, the complainant who was also I.O of the case had not produced the torch during recording of his evidence. It has also come on record that word Ninja was written in all eight pieces of chars in golden colour but neither this fact has been mentioned in the FIR nor it has been mentioned in the mashirnama of arrest and recover. We have also noticed that the report of chemical examiner was also not conducted as per protocol / rules prescribed by the Federal Government and such observation has also been made by the Honourable Supreme Court in an un-reported case of *NADEEM V/S. THE STATE*, through Prosecutor General, Sindh in Criminal Petition No.105-K of 2016 dated 04.04.2018, in which the case of *IKRAMULLAH V/S. THE STAE (Supra)* has been maintained, which reads as under:-

“According to the FIR the petitioner and his co-convict had tried to escape "with" the motorcycle when they were intercepted by the police party but before the trial court Muhammad Ayub, S.I.P (PW1) had stated that upon seeing the police party the petitioner and his co-convict had started running away while leaving the motorcycle on the road and the engine of that motorcycle had gone off. Muhammad Jaffar, PC (PW2) had also deposed about running away of the petitioner and his co-convict but had kept quiet regarding leaving of the motorcycle by the petitioner and his co-convict while running away. Both the above mentioned witnesses produced by the prosecution, however, unanimously stated that while running away upon seeing the police party the petitioner and his co-convict had kept the relevant bag containing narcotic substance in their hands and it was in that condition that the petitioner and his co-convict had been apprehended by the police party. It is quite obvious that the initial story contained in the FIR had been changed during the trial and the changed story was too unreasonable to be accepted at its face value. Muhammad Ayub, S.I.P. (PW1) had stated before the trial court that after recovering the narcotic substance he had brought the same to the Police Station and it was he who had kept the recovered substance in safe custody whereas he had never claimed to be the Moharrir of the relevant Police Station. The record of the case shows that it was Ghulam Ali, P.C. who had taken the recovered substance to the office of the Chemical Examiner for

analysis but it is not denied that the said Ghulam Ali, P.C. had not been produced before the trial court by the prosecution. It is, thus, evident that safe transmission of the recovered substance from the local Police Station to the office of the Chemical Examiner had not been established by the prosecution. The record further shows that the Chemical Examiner's report adduced in evidence was a deficient report as it did not contain any detail whatsoever of any protocol adopted at the time of chemical analysis of the recovered substance. This Court has already held in the case of Ikramullah and others v. The State (2015 SCMR 1002) that such a report of the Chemical Examiner cannot be used for recording conviction of an accused person in a case of this nature. For all these reasons we find that the prosecution had not been able to prove its case against Nadeem petitioner beyond reasonable doubt.”

18. Furthermore, the evidence produced by the prosecution is not reliable, trustworthy and confidence inspiring for the reasons that there are material contradictions in the evidence of the prosecution witnesses as the complainant has stated that he had not tried to associate any private / independent person to associate as mashir to witness the alleged recovery of chars so recovered from the accused. The delay of two days in sending samples of chars to the chemical examiner cannot be ignored since its safe custody at *Malkhana* was questioned which the prosecution had not answered by adducing the reliable evidence in order to prove the case against the appellant and the learned trial Court while passing the verdict against the appellant has ignored all the material points of the case. We have also observed that report of chemical examiner furnished by the prosecution was also not in accordance with the rules / protocol as prescribed by the government. We have gone through the evidence of the prosecution witnesses and have come to a considerable view that there are material contradictions in the evidence of the complainant and mashirs and such type of evidence cannot be relied upon to hold the same against the accused until and unless the material and confidence inspiring evidence is brought on record whereby this Court may adopt the way as was adopted by the trial Court but in absence of such evidence this Court is compelled to

reverse the findings given by the trial Court. It is well settled principle of law that if there creates some reasonable doubt in a prudent mind then the benefit of which is to go in favour of the accused as observed in the case of TARIQ PERVEZ V/S. THE STATE, reported as 1995 SCMR 1345, wherein, the Honourable Supreme Court of Pakistan has held as under:

*“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.”*

19. Having explained herein above, we have come to the conclusion that the prosecution has miserably failed to prove it's case against the appellant beyond reasonable shadow of doubt. We, therefore, by extending benefit of doubt, allow this appeal and consequently the impugned judgment dated 20.11.2017 passed by the learned trial Court is *set-aside*. The appellant is confined in jail. He is ordered to be released forthwith, if not required in any other custody case.

**JUDGE**

**JUDGE**