

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD
Crl. Appeal No. D – 114 of 2019.

Before;

Mr. Justice Muhammad Iqbal Mahar
Mr. Justice Irshad Ali Shah

Appellant: Mirza Khan son of Noor Muhammad,
through Mr. Shah Nawaz Brohi, Advocate.

Respondent: The State, through Mr. Nazar Muhammad
Memon, Additional Prosecutor General

Date of hearing: 16-10-2019.

Date of decision: 16-10-2019.

J U D G M E N T

IRSHAD ALI SHAH, J. The facts in brief necessary for disposal of instant appeal are that on arrest from the appellant it is alleged to have been secured 1030 gram of opium by police party of PS B-Section Hyderabad for that he was booked and reported upon.

2. At trial, appellant did not plead guilty to the charge and prosecution to prove it examined PW-1 complainant SIP Tarique Aziz Baladi, PW Mashir PC Munawar Ali and SIO/SIP Nusrat Ali and then closed the side.

3. Appellant in his statement recorded u/s 342 Cr.P.C denied the prosecution allegation by pleading innocence, but did not examine him on oath or anyone in his defence to disprove the prosecution allegation against him.

4. On conclusion of the trial, learned trial Court found the appellant guilty for an offence punishable u/s 9(c) of CNS Act, and then convicted and sentenced him to undergo R.I for four years and

to pay fine of Rs.8000/=and in case of his failure, to make payment of fine to undergo Simple Imprisonment for one month vide its judgment dated 14.06.2019, which is impugned by the appellant before this Court by preferring the instant appeal.

5. It is contended by learned counsel for the appellant that the appellant being innocent has been involved in this case falsely by the police; there is no independent witness to the incident; the incharge of malkhana has not been examined by the prosecution to prove the safe custody of contraband substance; the contraband substance has been subjected to chemical examination with delay of about four days and the evidence which the prosecution has produced being inconsistent and doubtful has been believed by learned trial Court without lawful justification. By contending so, he sought for acquittal of the appellant.

6. Learned A.P.G for the State by supporting the impugned judgment has sought for dismissal of instant appeal.

7. We have considered the above arguments and perused the record.

8. As per complainant SIP Tarique Aziz Baladi the appellant was arrested at about 2110 hours, which is disputed by PW/Mashir Munawar Ali, as per him, the appellant was arrested at about 2030 hours. Such dispute with regard to time of arrest of the appellant could not be overlooked. On arrest, from the appellant as per the complainant SIP Tarique Aziz Baladi and PW Mashir PC Munawar Ali

was secured 1030 grams of opium. It was weighed to be 1026 grams by the chemical examiner. The dispute with regard to the weight of the contraband substance could not be lost sight of. The contraband substance has been subjected to chemical examination on 4th day of its recovery, such delay could not be ignored. The contraband substance on recovery before its dispatch to chemical examiner as per prosecution was kept in police malkhana, but incharge of malkhana has not been examined by prosecution to prove safe custody of contraband substance in malkhana.

9. In case of **Ikramullah & ors vs. the State (2015 SCMR-1002)**, it has been observed by Hon'ble apex court that;

“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 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”.

10. The discussion involved a conclusion that the prosecution has not been able to prove its case against the appellant beyond shadow of doubt and he is found entitled to such benefit.

11. In case of **Tarique Pervaiz vs. The State (1995 SCMR 1345)**, it has been held by Hon'ble Apex Court that;

“For giving benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt- if a simple circumstance creates reasonable doubt in a prudent mind about the guilt of the accused, then he will be entitled to such benefit not as a matter of grace and concession but as a matter of right.”

12. Based upon above discussion, the conviction and sentence awarded to the appellant together with the impugned judgment are set-aside, the appellant is acquitted of the offence, for which he has been charged, tried and convicted by the learned trial court. The appellant is in custody, he shall be released forthwith in present case.

13. The instant appeal is disposed of accordingly.

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