

**IN THE HIGH COURT OF SINDH,  
CIRCUIT COURT HYDERABAD**

Cr. Appeal No. D- 105 of 2017

**Present:-**

**Mr. Justice Abdul Maalik Gaddi.**  
**Mr. Justice Khadim Hussain Tunio**

Date of hearing: 23.01.2020

Date of Judgment: 23.01.2020.

Appellant present on bail: Through Mr. Zeeshan Ali Burdi, Advocate

State: Through Ms. Rameshan Oad Asst. Prosecutor General, Sindh.

**JUDGEMENT**

**ABDUL MAALIK GADDI, J-** This appeal has been preferred against the judgment dated 29.09.2017 passed by the learned Special Judge under Control of Narcotic Substances Act, Hyderabad in Special Case No.46 of 2017 arisen out of Crime No.43 of 2017, registered U/S 9(c) of CNS Act, 1997 at PS Hali Road. In terms of the said judgment, the appellant has been convicted and sentenced as follows:-

“Imprisonment for four (04) years and six (06) months with fine of Rs.20,000/-. In case of non-payment of fine, the appellant shall undergo S.I for five (05) months more.”

2. Brief facts of the prosecution case are that on 09.04.2017, complainant under entry No.15, left police station at 1700 hours in official vehicle SPD-202 driven by DPC Muhammad Rafiq in the company of police constables Abdul Haque and Zakaria Masih for patrolling and checking. After patrolling Fateh Chowk, Muhammadi Chowk, Sabzi Mandi, when they reached at Makrani Paro Phatak, complainant received spy information that a person with beard and moustaches, is standing in village Ismail Kalhoro near shrine of Baqar Shah, having black colour shopper in his hand and he is selling Charas. On this, the complainant party reached the pointed place and found that said person, having black colour shopper in his hand,

standing there, who seeing police party coming towards his side in official vehicle, attempted to go towards the population side. The complainant party, finding him suspect, apprehended him at 1800 hours. The complainant then enquired his name, residential address and other particulars. He disclosed his name as Muhammad Dawood S/o Muhammad Yakoob, by caste Panhwar, R/O Village Usman Panhwar, Site Area Hyderabad. Due to non-availability of private mashirs, in presence of PC Abdul Haq and PC Zakariya, he was searched and black colour shopping bag in his hand was taken into custody and checked, from which four pieces of Charas were secured. From the front pocket of his shirt, two currency notes of Rupees hundred denominations each total Rs.200/- were also secured. The recovered Charas was put to electronic scale along with shopper, which came to two kilograms and was sealed in white colour cloth theli for chemical examination. As the accused committed offence under Section 9-C CNS therefore, he was accordingly arrested and such mashirnama was prepared in presence of above mashirs. Thereafter, the arrested accused along with recovered property was brought at police station, where F.I.R was lodged by the complainant.

3. On 17.07.2017, the charge against accused was framed wherein he pleaded himself to be innocent and claimed trial of the case.

4. In order to prove its case, the prosecution examined two witnesses. PW-1 Complainant SIP Muhammad Nasir at Ex-05, who produced departure entry at Ex.5/A, FIR at Ex.5/B, arrival entry at Ex.5/C, mashirnama of arrest and recovery at Ex.5/D, malkhana entry at Ex.5/E, malkhana register at Ex.5/F, letter dated 11.04.2017 whereby the property was sent to chemical examiner at Ex.5/G, CRO of accused at Ex.5/H, and chemical report at Ex.5/I. PW-2 PC-Mashir Abdul Haque was examined at Ex.6. The prosecution witnesses have been cross-examined by learned counsel for the appellant at length. Thereafter, prosecution closed its side at Ex.7.

5. Statement under Section 342 Cr.P.C of the accused was recorded at Ex.8, wherein he denied all the allegations levelled against him by the prosecution and claimed his false implication and foistation of charas. However, neither he examined himself on oath nor led any evidence in defence.

6. It is contended by learned counsel for appellant that both the mashirs of recovery are police officials; that police party was on

patrolling in the area, therefore, existence of passerby from the place of incident cannot be ignored but in spite of that no private person was cited as mashir of recovery; that there are contradictions between the evidence of complainant and mashirs; that appellant has been implicated in this case falsely due to enmity as the mother of appellant had filed an application u/s 491 Cr.P.C before the learned Ex-Officio Justice of Peace, Hyderabad showing the illegal confinement of appellant and his brother Ayaz at the hands of SITE police; that alleged recovery of charas has been foisted upon the appellant; that alleged recovered charas was sent to the chemical examiner for its examination and report on 11.04.2017 after the delay of three (03) days; that the alleged recovered charas was sent to the chemical examiner through WPC Saqib but he has not been examined before the trial Court; that safe custody of alleged recovered charas at malkhana for intervening period of three days is also questionable for the prosecution and tampering in the case property during said period cannot be ruled out. Lastly he has prayed for acquittal of appellant.

7. Conversely, learned A.P.G while opposing this appeal has argued that the appellant was found in possession in huge quantity of charas in presence of mashirs who have no enmity whatsoever with the appellant; that provision of Section 103 Cr.P.C is not attracted in the narcotic cases; that evidence of police officials is as good as that of a private person. She has therefore, supported the impugned judgment.

8. We have heard the learned counsel for the parties at considerable length and perused the evidence and documents available on record with their able assistance.

9. It is the case of advance spy information. It appears from the record that on 09.04.2017, complainant / SIP Rao Muhammad Nasir of Police Station Hali Road was on patrol duty alongwith his subordinate staff and during patrolling when they reached at Makrani Mohallah they received spy information that present appellant was selling Charas near Dergah Baqar Shah, Ismail Shah Goth. On such information, police party reached at the pointed place and arrested the appellant and recovered 2000 grams of Charas from his possession in presence of mashirs PC Abdul Haque and PC Zakariya. It is noted that the place from where the complainant received spy information was surrounded by shops and houses but neither they associated any independent person from the place of information nor from the place from where the present appellant was arrested to witness the event. No

explanation is available on record why the police party did not obtain the services of private persons though were available. No doubt, the evidence of police officials is good as that of other witnesses but in a case when private persons were available, their non-association in recovery proceeding is a question mark in the prosecution case. We are conscious of the fact that provisions of section 103 Cr.P.C. are not attracted to the cases of personal search of accused in narcotics cases. However, where alleged recovery was made on a road-side or populated area where the people / private persons were available, omission to secure independent mashir / witness, particularly, in the case of spy information cannot be brushed aside lightly by this Court. Prime object of section 103 Cr.P.C. is to ensure transparency and fairness on the part of police during course of recovery to curb false implication as well as minimize the scope of foisting fake recovery upon accused. During the course of arguments, we have also noted and found wide space of doubt in the prosecution case as well as the alleged incident has taken place on 09.04.2017 while the alleged case property / sample of narcotic substance was sent / received to the Chemical Examiner's office through WPC Saqib on 11.04.2017 after the lapse of more than three days without any explanation. Said WPC Saqib has also not been examined in this case who handed over the case property to the office of Chemical Examiner for testing purpose.

10. During the course of arguments, we have asked the question from learned A.P.G why WPC Saqib has not been examined in this case though was material witness, she has no satisfactory answer with her. In our opinion, non-examination of WPC Saqib caused a clear dent in prosecution case.

11. Moreover, during the course of arguments, learned counsel for the appellant produced certified copies of different judgments in which present appellant / accused has been acquitted. On the other hand, learned A.P.G has failed to bring on record any criminal case in which the present appellant / accused has been convicted. Be that as it may, mere involvement of appellant in like nature case(s) shall not come in his way in this case, since it is a settled principle of law that each and every case has to be decided on its own merits.

12. During the course of arguments, learned counsel for the appellant has drawn our attention towards application under section 491 Cr.P.C. filed on 30.03.2017 by Mst. Zainab, mother of the present appellant before the District Judge, Hyderabad in which she stated

that present appellant had been arrested by police of PS SITE and kept him in wrongful confinement with his brother namely Ayaz. On the said application report was called, which was received showing the present appellant in custody in respect of present case, registered on 09.04.2017; where his brother Ayaz was also shown arrested in Crime No.17/2017 of Police Station SITE foisting upon him 5000 grams of charas and in the said case Ayaz (brother of appellant) has been acquitted by the trial Court on 01.02.2019 and no appeal against the said judgment has been filed by prosecution and according to learned counsel for the appellant, due to the application filed by the mother of appellant this F.I.R. has been lodged and the Charas has been foisted upon him with malafide intention.

13. Perusal of record shows that present incident had taken place on 09.04.2017 but mother of present appellant moved aforementioned application on 30.07.2017 much prior to registration of present F.I.R. We have also noted that news clipping appearing in daily "Express" dated 07.04.2017, produced by learned counsel for the appellant during course of arguments, also supports the case and claim of appellant that he alongwith his brother Ayaz was already in custody of police when the case in hand was registered. Moreover, the appellant / accused while recording his statement under section 342 Cr.P.C. before trial Court totally denied the case of the prosecution by stating that it is false. When the version of the prosecution and that of appellant / accused put on juxta-position then it would appear that the claim of the appellant appears to be more plausible than prosecution. During the course of arguments, with the able assistance of learned counsel for the parties, we have gone through entire prosecution evidence and found the same contradictory with each other on material points / aspect of the case which have also been highlighted in the grounds of memo of appeal. When these contradictions and infirmities were also confronted with learned A.P.G, she has again no satisfactory answer with her. Therefore, plea of innocence raised by appellant in this case cannot be ignored and the appellant appears to be entitled for benefit of such contradictory evidence.

14. The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving benefit of doubt to an accused, 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 accused, then the accused will be

entitled to the benefit not as a matter of grace and concession but as a matter of right. Reliance is placed on the case of Tariq Pervez V The State (1995 SCMR 1345).

15. For what has been discussed herein above, we are of the considered view that the prosecution has failed to discharge its liability of proving the guilt of appellant beyond any shadow of doubt. Therefore, while extending the benefit of doubt in favour of appellant, we hereby set-aside the conviction and sentence recorded by the learned trial court vide impugned judgment dated 29.09.2017, acquit the appellant of the charge and allow this appeal. The appellant is present on bail, his bail bond stands cancelled and surety discharged.

**JUDGE**

**JUDGE**

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