

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

Cr. Appeal No. D- 55 of 2014

PRESENT:

Mr. Justice Naimatullah Phulpoto
Mr. Justice Muhammad Karim Khan Agha.

Appellant : Abdul Sattar present on bail through
Mr. Amjad Ali Sahito, Advocate

Respondents : The State
through Syed Meeral Shah Bukhari, Addl:P.G.

Date of hearing : 25.05.2017
Date of judgment : 25.05.2017

J U D G M E N T

NAIMATULLAH PHULPOTO, J: Appellant Abdul Sattar alongwith co-accused Atta Muhammad (since acquitted) was tried by learned Sessions Judge / Special Court for CNS, Tando Muhammad Khan in Special Case No. 43 of 2012 for offence under Section 9(b) Control of Narcotic Substance Act, 1997. By judgment dated 29.04.2014, co-accused Atta Muhammad was acquitted by trial court. However, present appellant/accused was convicted u/s 9(b) of CNS Act 1997 and sentenced to suffer R.I for one year and three months and to pay fine of Rs.9,000/-. In case of default in payment of fine, he was ordered to suffer SI for three months more. Benefit of Section 382-B Cr.P.C. was extended to the appellant.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 02.08.2012 SIP Abdul Aziz Chutoo of PS Mullakatiar left police station

alongwith his subordinate staff vide roznamcha entry No.5 at 0900 hours for patrolling duty. While patrolling at various places, when police party reached at Mullakatiar town SHO received spy information that accused Abdul Sattar and Atta Muhammad were selling charas near Pir of Alam Sharif. Police party proceeded to the pointed place where they saw both the accused standing in the bushes. There were 7/8 other persons available there in the bushes. It is alleged that those persons ran away while seeing the police party. It is alleged in FIR that police arrested the accused Abdul Sattar while another accused succeeded in running away. His name was disclosed by accused Abdul Sattar as Atta Muhammad. On inquiry, present accused disclosed his name as Abdul Sattar s/o Muhammad Moosa by caste Dal r/o Mullakatiar town. Personal search of the accused was conducted in presence of the mashirs PCs Mado Khan and Qadir Bux. From the side pocket of the shirt of the accused, one slab/piece of charas was recovered, in the white coloured plastic bag. Cash of Rs.50/- was also recovered from the accused. Charas was weighed in presence of the mashirs and it became 120 grams. The plastic bag which was thrown by another accused namely Atta Muhammad was opened in presence of the mashirs, charas was weighed it became 110 grams. It is alleged that 10 grams each were separated for sending to the chemical examiner. The samples were separately sealed so also the remaining property. Accused Abdul Sattar and case properties were brought at police station where FIR was registered against both the accused on behalf of the State, vide crime No.30/2012 u/s 9 (b) of CNS Act, 1997.

3. During the investigation 161 Cr.P.C. statements of the PWs were recorded, sample was sent to the chemical examiner, positive report was received. On the conclusion of investigation, challan was submitted against the accused. Thereafter, accused Atta Muhammad appeared before the trial court after obtaining the bail.

4. Trial Court framed charge against both accused u/s 9(b) of CNS Act, 1997, to which, both accused pleaded not guilty and claimed to be tried.

5. At the trial, prosecution examined PW-1 complainant SIP Abdul Aziz Chutto at Ex.03, who produced roznamcha entry No.4 and 5, memo of arrest and recovery, FIR and chemical report at Ex.3/A to 3/E respectively; PW-2 mashir PC Mado Khan at Ex.4. Thereafter, prosecution side was closed at Ex.5.

6. Statements of accused were recorded u/s 342 Cr.P.C. at Ex.6 and 7, both accused claimed false implication in this case and denied the prosecution allegations. Regarding positive report of chemical examiner, accused replied that it has been managed by police. Both accused stated that PWs are interested. Both accused did not examine on oath in disproof of the prosecution allegations nor led any evidence in defence.

7. Learned Special Judge after hearing the learned counsel for the parties and examining the evidence available on record, by judgment dated 29th April 2014 convicted and sentenced the present appellant as stated above. However, co-accused Atta Hussain was acquitted of the charge.

8. Facts of the prosecution case as well as evidence finds an elaborate mention in the judgment of the trial court as such there is no need to repeat the same to avoid unnecessary repeatation.

9. We have heard Mr. Amjad Ali Sahito, Advocate for appellant, Syed Meeral Shah, Additional Prosecutor General for the State and perused the entire evidence minutely.

10. Mr. Sahito, learned advocate for appellant has mainly contended that the prosecution story was un-natural and unbelievable. Learned counsel for appellant argued that the police officials were armed with official arms and

ammunitions, it was unbelievable that the accused Atta Muhammad succeeded in running away from the place of incident and police did not made any effort to capture him. Learned advocate for appellant further contended that after recovery of charas from the accused, it was sent to the chemical examiner after three days and safe custody of the charas at Malkhana and its safe transit have not been established at trial. Learned counsel for appellant further argued that according to the evidence of prosecution charas was taken to the chemical examiner by PC Imtiaz but he has not been examined before the trial court. Learned counsel argued that on the same set of evidence co-accused Atta Muhammad was acquitted by the trial court by disbelieving the prosecution evidence and conviction of appellant on same evidence required independent corroboration which was lacking in this case. On the point of safe custody and safe transit, learned counsel for the appellant has placed reliance on the case of *TARIQ PERVEZ V/S. THE STATE (1995 SCMR 1345)*, and *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)*.

11. Syed Meeral Shah, Additional Prosecutor General, appearing for the State conceded to the arguments raised by learned counsel for the appellant and did not support the judgment of the trial court.

12. We have carefully heard the learned counsel for the parties and scanned the entire evidence in the light of case law cited by the counsel for the appellant.

13. In our considered view, prosecution has utterly failed to prove its' case against the appellant for the reasons that it was the case of spy information. SHO had sufficient time to call the independent persons of the locality to witness the recovery proceedings but it was not done by him for the reasons best known to him. It was unbelievable that the police party was armed with official arms and ammunition and trained force but co-accused Atta Muhammad succeeded in running away from the place of wardat and the police party made

no efforts to arrest him. It is the matter of record that the charas was recovered from possession of accused on 02.08.2012 but in the evidence of complainant no where it is mentioned that after return to the police station charas was kept in Malkhana. No entry in this regard has been produced before the trial court. Incharge of Malkhana has also not been examined so also PC Imtiaz who had taken sample to the chemical examiner. It has also not been proved that it was a safe transit case. It is the matter of record that co-accused Atta Muhammad has been acquitted by the trial court on the same set of evidence meaning thereby, the evidence of prosecutions to that extent was disbelieved by the trial court. 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.”

14. 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. Learned A.P.G. has also not supported the judgment of the trial court. 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.

15. We have no hesitation to hold that the prosecution has failed to prove its case against the accused. Appeal is allowed. Resultantly, the conviction and sentence recorded by the trial court vide judgment dated 29th April 2014 are set aside. Appellant is acquitted of the charge. Appellant is present on bail. His bail bond stands cancelled and surety is hereby discharged.

JUDGE

JUDGE

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