

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

**Cr. Appeal No. D-118 of 2015  
Cr.Jail.Appeal.No.D- 02 of 2016**

**PRESENT:**

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

Appellant : Lakhadino through  
Mr. Mian Taj Muhammad Keerio, Advocate

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

Date of hearing : 24.05.2017  
Date of judgment : 24.05.2017

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

***NAIMATULLAH PHULPOTO, J:*** Appellant Lakhadino s/o Sawan Chohan was tried by the learned Special Judge for CNS, Badin in Special Case No. 33 of 2015 for offence under Section 9(c) Control of Narcotic Substance Act, 1997. By judgment dated 03.12.2015, the appellant was convicted and sentenced to suffer R.I for 08 years and to pay fine of Rs.100,000/-. In case of default in payment of fine, he was ordered to suffer SI for one year 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 present accused was arrested on 12.03.2015 SIP Muhammad Umer Nohio of CIA Centre Badin alongwith his subordinate staff namely PC Muhammad Bux and DPC Malook left CIA Centre vide roznamcha entry No.11 at 1645 hours in government vehicle for arresting the absconders and drug peddlers. During

patrolling it is alleged that they received spy information that the present accused was selling charas under the baber tree at eastern bank of Nasir wah near New Dumbalo. On receipt of such information Excise Police proceeded to the pointed place where they saw the present accused standing there. He was surrounded and caught hold. On inquiry he disclosed his name as Lakhadino s/o Sawan r/o Allah Abad Digri. His personal was conducted in presence of the mashirs. One black coloured shopper was recovered from the left fold of his Shalwar. There were two big pieces of charas in shopper and "GUL Nam 2014" was written on the packets. It is stated that private persons were not available there hence the Sub-Inspector made PCs Haji Misri and Muhammad Bux as mashirs and weighed the charas it became 1010 grams. Such mashirnama was prepared in presence of the mashirs. Thereafter, accused and case property were brought at police station where F.I.R. was lodged by complainant SIP Muhammad Umer Nohrio on behalf of the State under section 9(c) CNS Act.

3. During investigation, Investigating Officer did not visit the place of wardat nor he recorded 161 Cr.P.C. statements of the PWs. Sample of the substance / charas was sent to the chemical examiner on 16.03.2015 through PC Aslam and positive chemical report was received. On the conclusion of investigation challan was submitted against the accused for offence u/s 9(c) of CNS Act, 1997.

4. Trial Court framed charge against accused at Ex.5 u/s 9(c) of CNS Act, 1997, to which, accused pleaded not guilty and claimed to be tried.

5. At the trial prosecution examined PW-1 complainant SIP Muhammad Umer at Ex.7, who produced memo of arrest and recovery at Ex.7/A, FIR at Ex.7/B, departure entry at Ex.7/C and arrival entry at Ex.7/D; PW-2 PC Haji Misri, mashir at Ex.8 and PW-3 SIP Muhammad Iqbal Sathio, I.O of the case was examined at Ex.9, who produced the chemical report at Ex.9/A, roznamcha entries at Ex.9/B and 9/C. Thereafter, prosecution side was closed at Ex.10.

6. Statement of accused was recorded u/s 342 Cr.P.C. at Ex.11, in which accused claimed false implication in this case and denied the prosecution allegations. Accused had stated that he has been involved falsely in this case at the instance HC Abdul Khaliq Jarwar. Accused did not examine himself on oath in disproof of the prosecution allegations nor he led any evidence in his defence.

7. Learned Special Judge after hearing the learned counsel for the parties and examining the evidence available on record convicted and sentenced the appellant as stated above. Hence this appeal.

8. The brief facts of the prosecution case as well as evidence finds an elaborate mention in the judgment of the trial court and need not to repeat the same to avoid unnecessary repetition.

9. We have heard the learned counsel for the parties and perused the entire evidence minutely.

10. Mr. Mina Taj Muhammad Keerio, learned advocate for appellant has mainly contended that it was the case of CIA officials and on spy information the accused was arrested and the SHO had sufficiently time to call the independent person of the locality but the complainant failed to associate any person of the locality to witness the recovery proceedings. It is submitted that after recovery the CIA officials came at police station and lodged entry No.26. It is submitted that there is no mention in such entry that the charas was kept in safe custody at the police station. He has further contended that according to the case of prosecution charas was recovered from the possession of accused on 12.03.2015 but it was sent to the chemical examiner on 16.03.2015. The safe custody during that period has not been established. It is also contended that neither WHC of the police station nor PC Muhammad Aslam who had taken sample to the chemical examiner have been produced before the trial court for

their evidence. It is contended that there was no evidence that the efforts were made by the excise officials to call the independent persons of the locality though according to the counsel for the appellant accused has raised plea that he has been involved in this case at the instance of HC Abdul Khalique Jarwar. It is contended that sentence awarded to the appellant was against the sentencing policy as held in the case of Ghulam Murtaza reported in PLD 2009 Lahore 362 and upheld by the Honourable Supreme Court in the case of Ameer Zaib PLD 2012 SC 380. 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 recorded no objection for the reason that the trial court did not provide the facility of advocate on State expenses though offence was punishable for death or imprisonment for life. He 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 failed to prove its' case against the appellant for the reasons that it was the case of information. CIA officials had sufficient time to call the independent persons of the locality to witness the recovery proceedings but it was not done for the reasons best known to them. It is the matter of record that after recovery of charas from the accused, CIA officials came at police station and made entry No.26 but there is no mention in said entry that the charas was kept in safe custody. There was also delay of four days in sending the parcel to the chemical examiner without explanation. According to the case of prosecution charas was recovered from the

possession of accused on 12.03.2015 on spy information and it was sent to the chemical examiner on 16.03.2015. It is contended by defence counsel that the prosecution has failed to establish the safe custody of charas at Malkhana for four days. Safe transit to the chemical examiner has also not been proved. HC Muhammad Aslam who had taken sample to the chemical examiner has not been produced before the trial court for recording his evidence. We have perused the evidence of the Investigation Officer. It appears that he has only completed the formalities. He has stated that he did not inspect the place of wardat. He has also admitted that no entry was kept at police station that he has kept the charas in Malkhan and the charas was safe and secured till it was transit to the chemical examiner. The evidence further reflected that the evidence of the prosecution witnesses was recorded in the absence of accused. Neither the accused was represented by any counsel nor the trial court provided him the facility of defence counsel on State expenses. Trial court was under the legal obligation to provide him the facility of defence counsel on State expenses but it was not done by the trial court. It was also duty of the trial court to put the question to the witness in order to ascertain the truth and credibility of the evidence. Learned 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 create doubt in the prosecution case. Under the law if a single doubt is created in the prosecution case, it is sufficient for recording the acquittal. In the case of *Tariq Pervez V/s. The State (1995 SCMR 1345)*, 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.”***

15. While relying upon the aforesaid authorities and keeping in view no objection raised by the learned A.P.G. we have no hesitation to hold that the prosecution has failed to prove its case against the accused. Resultantly, the impugned judgment dated 03.12.2015, passed by the trial court is set aside. The appeal is allowed. Appellant is acquitted of the charge. Appellant in custody. He shall be released forthwith if he is not required in some other case.

JUDGE

JUDGE

Tufail