IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD

Cr.Jail.Appeal.No.D- 123 of 2017

Present:-
Mr. Justice Naimatullah Phulpoto.
Mr. Justice Shamsuddin Abbasi.

Appellant	:	Ali Jan s/o Abdullah by caste Magsi through Mr. Willayat Ali Magsi, Advocate.
Respondent	:	The State through Syed Meeral Shah, A.P.G.
Date of hearing	:	10.05.2018
Date of judgment	:	10.05.2018

J U D G M E N T

NAIMATULLAH PHULPOTO, J: Ali Jan s/o Abdullah by caste Magsi, appellant was tried by learned Special Judge (Narcotics) Shaheed Benazirabad in Special Case No. 375 of 2016 for offence under Section 9(c) Control of Narcotic Substance Act, 1997. On the conclusion of trial, vide judgment dated 19.10.2017, appellant was convicted u/s 9 (c) of CNS Act, 1997 and sentenced to 05 years R.I and to pay fine of Rs.50,000/-. In case of default in payment of fine, appellant was ordered to suffer S.I for 06 months more. Appellant was extended benefit of Section 382-B Cr.P.C.

2. The prosecution case as emerged from the recitals contained in first information report and the evidence adduced during the trial is as under:-

3. That on 15.07.2016 SIP Abrar Hussain Rind left police station along with his subordinate staff for patrolling vide roznamcha entry No.25 at 0600 hours. After patrolling at various places, when the police party reached Moro Dour road near Amerji Mori, where it is alleged that police saw the present accused coming on the road. He was carrying a black coloured shopper in his hand. Accused tried to run away but he was apprehended and caught hold by the police party. On inquiry, he disclosed his name as Ali Jan s/o Abdullah Magsi r/o Magsi Machine near bypass Sakrand. SIP recovered plastic bag from the possession of accused. On account of non-availability of private mashirs, he made his sub-ordinates as mashirs and opened the plastic shopper it contained 8 packets of charas. Complainant found 7 packets containing 2 pieces in each packet and single piece in one packet. The entire recovered charas became 7000 grams. Personal search of the accused was also conducted and cash of Rs.350/- were recovered. Mashirnama of arrest and recovery was prepared in presence of mashirs ASI Qurban Ali and HC Ameer Ahmed. Charas was sealed at spot. Thereafter, accused and case property were brought at police station where FIR was lodged against the accused vide Crime No.60/2016 at P.S. Dour under section 9 (c) of CNS Act, 1997.

4. During investigation, charas was sent to the chemical examiner for report on 15.07.2016 through PC Dilmurad and it was received in the office of chemical examiner on 18.07.2016. Positive report of the chemical examiner was collected by I.O. On the conclusion of usual investigation, challan was submitted against the appellant/accused u/s 9 (c) of CNS Act, 1997.

5. Trial Court framed charge against accused at Ex.2, to which he pleaded not guilty and claimed to be tried.

6. At the trial, prosecution examined two witnesses in this case i.e. complainant and mashir. Thereafter, prosecution side was closed.

7. Statement of accused was recorded u/s 342 Cr.P.C. at Ex.7 in which he claimed false implication in this case and denied the prosecution allegations. In a question what else he has to say? accused replied that he has been falsely implicated by police. He was arrested by police of P.S Taluka on 05.07.2016 thereafter he was illegally detained at different police stations. His brother Ali Gul moved an application u/s 491 Cr.P.C. before the learned Sessions Judge Shaheed Benazirabad. Raid was conducted but he was shifted by police to some other police station. He has submitted that the police has foisted charas upon him at the instance of one Muhammad Ali Magsi who is his cousin and on inimical terms due to dispute over the plot. Accused has produced the certified true copy of Criminal Miscellaneous Application and raid report at Ex.6/A and 6/B. Accused wanted to examine defence witnesses but later on the same were given up by counsel for the accused vide statement dated 06.07.2017. Accused did not examine himself on Oath in disproof of the prosecution allegations.

8. Learned Special Judge after hearing the learned counsel for the parties and examining the evidence available on record, by judgment dated 19.10.2017 convicted and sentenced the appellant as stated above. Hence, this appeal is filed.

9. We have carefully heard the learned counsel for the parties and scanned the evidence available on record.

10. Contentions of the learned counsel for the parties shall be reflected in our judgement. We are not inclined to record contentions separately.

11. Facts of this case and evidence find an elaborate mention in the judgement of the trial court hence there is no need to repeat it.

12. Record reflects that complainant SIP Abrar Hussain left police station on 15.07.2016 alongwith his subordinate staff vide roznamcha entry No.25. According to prosecution case, police arrested accused on the road he was carrying a black coloured shopper it contained 7000 grams charas. Mashirnama of arrest and recovery was prepared in presence of the mashirs. Thereafter, police brought the accused and case property to the police station where SIP lodged FIR on behalf of the State. SIP sent charas to the chemical examiner and produced chemical report. He was cross examined by the defence counsel. He replied that he sent charas to the chemical examiner through PC Dilmurad. From the close scrutiny of evidence of SIP Abrar Hussain, we have come to the conclusion that the safe custody of charas at Malkhana of the police station has not been established. According to SIP he handed over charas to PC Dilmurad on 15.07.2016 but the charas was received in the office of chemical examiner on 18.07.2016. There was nothing on the record that where PC Dilmurad kept charas for three days. Safe custody of the charas and its safe transmission to the chemical examiner have not been established. There are peculiar circumstances in this case. Appellant had raised defence plea since beginning that he has been involved in this case falsely at the instance of his cousin namely Muhammad Ali due to dispute over the plot. Investigation Officer failed to examine Muhammad Ali in order to ascertain about the dispute over plot

between the appellant and his cousin. Accused has raised plea that he was arrested from his village by the above named police officials on 05.07.2016 and was brought to the police station where he was illegally detained. The brother of appellant submitted an application u/s 491 Cr.P.C. before the learned Sessions Judge, Shaheed Benazirabad. Raid Commissioner was appointed on 11.07.2016. Raid was conducted but it was failed. Plea has been raised by the appellant that during the period of his illegal detention, he was shifted to different places. Appellant / accused produced before the trial court certified true copy of an application u/s 491 Cr.P.C. Unfortunately, trial court did not consider this aspect of the case and defence theory was disbelieved without any legal justification.

13. We have also noticed that there are material contradictions in the evidence of complainant/Investigation Officer and mashir with regard to the description of charas. In the cross examination of PWs, it came on record that some words and monogram of star were written on pieces of charas but in the mashirnama of arrest and recovery such particulars/descriptions are not mentioned. It is evident that a fair investigation of case was not conducted. It is mentioned in F.I.R that at the time of arrest and during interrogation accused stated that he was selling charas, question arose to whom he was selling charas, it was the duty of Investigation Officer to find out the truth but I.O utterly failed.

14. We are clear in our mind that investigation in the case in hand has not been carried out honestly. I.O made no effort to discover the actual facts/truth with regard to application u/s 491 Cr.P.C before learned Sessions Judge regarding illegal detention of accused. Moreover, there

was no evidence that after the recovery of charas, the same was safely kept in Malkhana of Police Station so also its safe transit to the chemical examiner have also not been established. Tampering with case property at Police Station could not be ruled out in the background of application u/s 491 Cr.P.C. Apart from that chemical examiner failed to prepare the report as per protocol as provided in the rules. We have no hesitation to hold that the report of the chemical examiner though positive was deficient in the eyes of law as held in the case of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002),* which has been endorsed by the Honourable Supreme Court in the recent judgment in the case of Nadeem v. The State through Prosecutor General, Sindh, Criminal Appeal No.06-K of 2008 in Criminal Petition No.105-K of 2016, dated 04.04.2018 which reads as follows:-

> ***"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 fkramullah 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."***

15. In our considered view, prosecution has failed to prove its' case against the appellant. Circumstances mentioned above have created reasonable doubt in the prosecution case. 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. In this regard reliance can be placed upon the case of *Tariq Pervez V/s. The State (1995 SCMR 1345),* wherein 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."***

16. In view of the above, we have no hesitation to hold that the prosecution has failed to prove its' case against the accused. Resultantly, by our short order dated 10.05.2018, instant appeal was allowed. Conviction and sentence recorded by the trial court vide judgment dated 19.10.2017 were set aside and appellant was acquitted of the charge.

Appellant was in custody, he was directed to be released forthwith, if not required in some other case. There are the reasons of said short order.

JUDGE

JUDGE

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