

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

Cr.Appeal.No.D- 102 of 2016

Present:-
Mr. Justice Naimatullah Phulpoto.
Mr. Justice Muhammad Karim Khan Agha.

Date of hearing: 10.05.2017.
Date of judgment: 10.05.2017.

1. Appellant Abdul Razzaque s/o
Gohar Rehman by caste Sawari

2. Appellant Inayatullah s/o Kajeer Wali
By caste Yousuf Zai Pathan.

Through Mr. Farhad Ali Abro,
Advocate.

The State: Through Syed Meeral Shah, D.P.G.

J U D G M E N T

NAIMATULLAH PHULPOTO, J: Appellants Abudl Razak and Inayatullah were tried by learned Illrd Additional Sessions Judge / Special Court for CNS Hyderabad in Special Case No.58 of 2015 for offence u/s 9 (c) of CNS Act, 1997. By judgment dated 15.10.2016, appellants were convicted u/s 9(c) of CNS Act, 1997 and sentenced to 03 years RI and to pay the fine of Rs.10,000/- In case of default in payment of fine, appellants were ordered to suffer SI for three months more. However, benefit of Section 382-B Cr.P.C. was also extended to the accused.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 15.02.2015 SIP Mansoor Ahmed Memon of police station Hali Road lodged FIR against the accused on behalf of the State stating therein that he left police station on 15.02.2015 alongwith his subordinate staff namely HC Muhammad Yaseen, PCs Muhammad Akram, Ghulam Ghous and Akhtar Ali in the Government vehicle vide roznamcha entry No.09 at 1030 hours for patrolling duty. While patrolling at various places when the police party reached at Hazara Colony Mor near Shama Hotel, it is alleged that SHO received spy information that accused Abdul Razak wanted in so many cases alongwith his son was selling the charas. On such information police party proceeded to the pointed place and saw the accused Abdul Razak alongwith another person standing there. Both had black shoppers in their hands. They tried to run away towards Badin Phatak side but they were apprehended by the police. On inquiry, one accused disclosed his name as Abdul Razak. From his possession plastic shopper was secured. It was secured in presence of the mashirs. It contained two large and one small strip of charas. It was found to be 1200 grams. Five notes of Rs.100/- were also recovered from his possession. On inquiry, another accused disclosed his name as Inayatullah. From his possession one black shopper was also secured, it was checked and found containing the two large and one small strip of charas, same were weighed and found to be 1100 grams. Cash of Rs.700/- was also recovered from the possession of the accused. Whole substance / charas recovered from the possession of both accused was sealed at the spot in presence of the mashirs. Mashirnama of arrest and recovery was prepared in presence of the mashirs namely HC Muhammad Yaseen and PC Muhammad Akram. Thereafter, accused and the case property were brought at Police Station where FIR was lodged against the accused on behalf of the State. It was recorded vide crime No.27/2015 u/s 9(c) of CNS Act, 1997.

3. During investigation 161 Cr.P.C. statements of the PWs were recorded. Sample was sent to the chemical examiner for analysis on 18.02.2015. Positive report was received. On the conclusion of usual investigation challan was submitted against both the accused u/s 9(c) of CNS 1997.
4. Trial Court framed charge against accused persons u/s 9(c) of CNS Act, 1997. Accused met with the charge with denial.
5. In order to substantiate the charge before trial Court, prosecution examined PW-1 Complainant / SIP Mansoor Ahmed at Ex.4 who produced the memo of arrest and recovery, FIR, departure and arrival entries and chemical report, PW-2 mashir HC Muhammad Yaseen at Ex.5. Thereafter, prosecution side was closed at Ex.6.
6. Statements of accused were recorded u/s 342 Cr.P.C.at Ex.7 and 8, in which accuse have claimed false implication in this case and denied the prosecution allegations. Accused Inayatullah examined one Khan Nabi in defence and raised plea that he was going to offer Fajar prayer and he was falsely involved in this case. Accused stated that nothing was recovered from his possession. Accused Abdul Razak has also claimed false implication in this case and stated that PWs have deposed against him falsely. He wanted to examine one Muhammad Hanif in his defence. Accused Abdul Razak raised plea that he had filed the constitution petition against the police officials of P.S. Hali Road as such police was on inimical terms with him and charas has been foisted upon him. DW Khan Nabi was examined at Ex.9. Both accused declined to give statement on oath in disproof of prosecution allegations.

7. Learned trial court after hearing the learned counsel for the parties and assessment of evidence available on record convicted and sentenced the appellants as stated above. Hence, this appeal is filed.

8. Facts of the case in hand as well as evidence produced before trial Court find an elaborate mention in the judgment passed by trial Court and therefore, same may not be reproduced here so as to avoid duplication.

9. Mr. Farhad Ali Abro, learned advocate for appellants mainly contended that it was the case of spy information and the accused were arrested near Shama Hotel but no private persons was called by the SHO to act as mashir in this case. It is also submitted that the charas was kept in Malkhana of the police station for three days. Such entry has not been produced before the trial court and WHC of the police station has also not been examined. Learned advocate for the appellant argued that prosecution has failed to prove the safe custody of the charas in Malkhana so also the safe transit to the chemical examiner. It is argued that the description of case property is not mentioned in the mashirnama of arrest and recovery but the same has been mentioned by SIP Mansoor Ahmed in his evidence that it was "Raja Khan 2015". He further argued that there are material contradictions in the evidence of the prosecution witnesses. It is further contended that there was overwriting in the mashirnama of arrest and recovery. Lastly, it is contended that the appellant Abdul Razak had filed the constitutional petition against the police of Hali Road. It is submitted that appellant was in custody as such he could not produce the copy of that petition. In support of his contentions, learned counsel has placed reliance on the cases reported as *Tariq Pervez V/s. The State (1995 SCMR 1345)* and *Ikramullah & others v/s. The State (2015 SCMR 1002)*

10. Syed Meeral Shah, learned D.P.G. conceded to the contentions raised by learned advocate for the appellant and argued that there is no evidence that the charas was kept in safe custody for three days in Malkhana of the police station. Learned D.P.G. submitted that it is also the fact that WHC of the police station has not been examined by prosecution and there is overwriting in mashirnama of arrest and recovery. Learned D.P.G. did not support the impugned judgment.

11. 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 appellants.

12. We have come to the conclusion that prosecution has failed to prove its' case for the reasons that it was the case of spy information and noon time when the accused was arrested at some paces from Shama hotel but the SHO did not bother to call the independent persons from the hotel. Mashirnama of arrest and recovery clearly showed that there is overwriting of year in the mashirnama. Tampering in the mashirnama in the circumstances could not be ruled out. Perusal of mashirnama of arrest and recovery reflected that description of the charas has not been mentioned but it in the evidence SIP has mentioned that on one strip "Raja Khan 2015" was written. This improvement appears to be dishonest in order to strengthen the prosecution case. It the matter of record that the charas was kept in Malkhana by making entry in the register but the said entry has also not been produced. Learned advocate for the appellants has raised plea that accused Abdul Razak had filed the constitution petition against the police officials of P.S. Hali Road Hyderabad but he could not produce the copy of the petition as he was in custody.

13. Keeping in view the peculiar circumstances of the case, false implication of the appellants could not be ruled out. Learned advocate for the appellant has rightly relied upon the case of Ikramullah (supra) in which the Honourable Supreme Court has held that it is for the prosecution to satisfy the court that after recovery of the narcotic substance it was kept in safe custody in the Malkhana of the police station thereafter the safe transit to the chemical examiner. In this case the safe custody of the charas in Malkhana and the safe transit has not been proved by the prosecution. Positive report of the chemical examiner would not be helpful to the prosecution. Learned D.P.G. has also not supported the case of prosecution. It is settled law that the several circumstances are not required to extend the benefit of doubt in favour of the accused. 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. There are number of infirmities / lacunas in the prosecution case which have created reasonable doubts in the prosecution case. 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.”

14. For the above stated reasons we hold that the prosecution has failed to prove its case against the appellants beyond any shadow of reasonable doubt therefore while extending the benefit of doubt to the appellants, the appeal is allowed. The conviction and sentence awarded to the appellants by the trial

court vide judgment dated 15.10.2016 are set aside. Appellants are acquitted of the charge. Appellants are in custody. They shall be released forthwith if they are not required in some other case.

JUDGE

JUDGE

Tufail