

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

Cr.Appeal.No.D- 207 of 2006

Present:-
Mr. Justice Naimatullah Phulpoto.
Mr. Justice Zulfiqar Ahmed Khan.

Date of hearing: 13.04.2017.
Date of judgment: 13.04.2017.

Appellant Sikiladho s/o Ibrahim
By caste Langha.

Through Mr. Muhammad Hashim
Memon, Advocate.

The State:

Through Syed Meeral Shah, D.P.G.

J U D G M E N T

NAIMATULLAH PHULPOTO, J: Appellant Sikiladho s/o Ibrahim was tried alongwith co-accused Rashid s/o Gul Muhammad by the learned Special Judge for CNS Tharparkar at Mithi. By judgment dated 05.10.2006 the appellant was convicted u/s 9(b) of CNS Act, 1997 and sentenced to suffer RI for 02 years and to pay the fine of Rs.5,000/- In case of default in payment of fine he was ordered to suffer SI for one month more. However, accused Rashid by extending the benefit of doubt was acquitted of the charge.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 21.06.2006 at 1805 hours ASI Abdul Karim of PS Diplo left alongwith his subordinate staff namely PCs Muhammad Khan and Muhammad Hayat vide roznamcha entry No.12. While patrolling at various places when the police

party reached at Dargah Ghulam Shah they received spy information that two persons were selling charas on the eastern side of Badin bus stop. Thereafter police party proceeded to the pointed place where they saw the present appellant and Rashid standing there. Police surrounded them and succeeded to catch hold accused Sikiladho and the co-accused Rashid ran away from the scene of wardat. ASI conducted the personal search of accused Sikiladho in presence of the mashirs namely PCs Muhammad Khand and Muhammad Hayat. From the fold of Shalwar a plastic Thelhi was recovered it was opened in presence of the mashirs which contain charas 125 grams. Accused disclosed the name of accused who ran away as Rashid son of Gul Muhammad. Charas was weighed at the spot and mashirnama of arrest and recovery were prepared in presence of the mashirs. Thereafter, accused Sikiladho and case property were brought at the police station where FIR bearing crime No.20/2006 was lodged by ASI Abdul Karim on behalf of the State for offence u/s 9(b) of CNS Act, 1997.

3. During investigation, Investigation Officer recorded 161 Cr.P.C. statements of the PWs and sent 25 grams of charas as sample to the chemical examiner on 21.07.2006. Positive chemical report was received. On the conclusion of investigation challan was submitted against the accused Sikilado. Accused Rashid appeared before the trial court. Charge was framed against both the accused art Ex.2 u/s 9(b) of CNS Act, 1997. Both the accused pleaded not guilty and claimed to be tried. At the trial prosecution examined the following witnesses:-

PW-1 ASI Abdul Karim at Ex.6. He produced the attested copy of Roznamcha entry of departure at Ex.6/A, mashirnama of arrest and recovery at Ex.6/B, FIR at Ex.6/C and attested copy of return of roznamcha entry at Ex.6/D, PW-2 SIP Muhammad Hassan Ex.7. He produced the Chemical

Examiner's report (original) at Ex.7/A and PW-3 PC Muhammad Khan at Ex.8. Thereafter prosecution was closed.

4. Statements of accused were recorded u/s 342 Cr.P.C.at Ex.10 and 11. Both the accused claimed false implication in this case and denied the prosecution allegations. Plea raised by accused that PWs being police officials are interested. Accused did not examine themselves on Oath in disproof of prosecution allegations. No evidence was led by them in the defense and pleaded innocence.

5. Learned Special Judge after hearing the learned counsel for the parties and examining the evidence acquitted accused Rashid by extending him benefit of doubt however he convicted and sentenced the appellant as stated above.

6. We have carefully heard Mr. Muhammad Hashim Memon, learned advocate for appellant, Syed Meeral Shah, learned D.P.G. for the State and scanned the entire evidence.

7. It may be mentioned that the trial court vide judgment dated 05.10.2006 has given the entire facts of the case and discussed the evidence. There is no need to repeat the same.

8. Mr. Muhammad Hashim Memon, learned advocate for the appellant Sikiladho submits that the prosecution has failed to prove its case against the appellant beyond any reasonable doubt. He has submitted that there are number of infirmities in the prosecution. He has submitted that according the case of prosecution police party left for patrolling on 21.06.2006 under roznamcha entry No.12 but at Ex.6/A reflects the date as 20.06.2006. It is submitted that in fact police officials had not left for patrolling and the charas has been foisted upon the accused. It is also submitted that according to the

case of prosecution accused was arrested on 21.06.2006 and 125 grams charas was recovered from the possession of accused but according to the chemical examiner report 25 grams of charas were sent to the chemical examiner on 22.07.2006 after one month. It is submitted that such inordinate delay in sending the sample to the chemical examiner is fatal to the prosecution case. He has submitted that there is over writing in the report of the chemical examiner regarding the Head Constable who had taken charas to the chemical examiner. It is submitted that ASI nowhere in his evidence or in the mashirnama has mentioned that how many grams charas was taken to the chemical examiner as sample from the charas recovered from the accused but 25 grams charas sent to the chemical examiner. Learned counsel for the appellant argued that tampering with the charas for such long period at police station could not be ruled out. He has submitted that charas was weighed in a shop but the shop keeper has not been examined by the prosecution. Learned advocate for appellant referred to the over writing in the mashirnama Ex.6/B with the regard to cash recovered from the appellant. Lastly, it is contended that there are several circumstances in this case which create doubt in the prosecution case.

9. Syed Meeral Shah, learned D.P.G. conceded the contentions raised by learned counsel for the appellant and did not support the judgment of the trial court.

10. We have carefully heard the learned counsel for the parties and have gone through the evidence minutely.

11. We have come to the conclusion that the prosecution has failed to prove its case against the appellant beyond any shadow of doubt for the reasons that according to the case of prosecution ASI Abdul Karim left the PS alongwith his subordinate for patrolling vide roznamcha entry No.12 and he

arrested the accused Sikiladho and from his possession recovered 125 grams of charas but it was very strange that another accused Rashid succeeded in running away from the police party who were armed with official arms and ammunition. There is also another aspect in this case that on the same set of evidence accused Rashid by extending him benefit of doubt has been acquitted of the charge by the trial court. Once prosecution witnesses are disbelieved with respect to a co-accused then, they cannot be relied upon with regard to other co-accused unless they are corroborated by corroboratory evidence coming from unimpeachable in nature but that is not available with prosecution in the present case. In this regard reference is made to the case of Muhammad Asif v. The State (2017 SCMR 486), the view held in above referred case is reproduced below:-

“Both these two eye-witnesses have been disbelieved by the investigation agency qua the acquitted two co-accused/the real brothers of the appellant. It is a trite principle of law and justice that once prosecution witnesses are disbelieved with regard to the other co accused unless they are corroborated by corroboratory evidence coming from independent source and shall by unimpeachable in nature but that is not available in the present case.

In this regard reference can be made to case of Ghulam Sikandar and another v. Mamaraz Khan and others (PLD 1985 SC 11). The view held in the above case/reference is reproduced below:-

“Appreciation of evidence. Principle of indivisibility of credibility. Maxim. Falsus in uno falsus in omnibus. Application of principle. Witnesses found false with regard to implication of one accused about whose participation he had deposed on oath. Credibility of such witness regarding involvement of other accused in same occurrence when shaken. Where it was found that a witness has falsely implicated one accused person, ordinarily he would not be relied with regard to other accused in same transaction but if testimony of such witness was corroborated by very strong and independent circumstances regarding each one of other accused, reliance might then be placed on such witness for convincing other accused when principle of indivisibility of credibility as laid down in Muhammad Faiz Bakhsh v. The Queen is to be ignored.”

It is the matter of record that police party left for patrolling on 21.06.2006 but roznamcha entry No.12 Ex.6/A produced by the prosecution before the trial

court reflected that on police party left on 20.06.2006. Learned D.P.G. could not explain the ambiguity in the prosecution case. It is the matter of record that charas was weighed at the shop of one Meghwar but the said shopkeeper was not made as mashir nor has been examined by the prosecution. It is also not clear that how many grams were taken for sample for sending to the chemical examiner.

12. In view of the aforesaid infirmities in the case of prosecution it would be unsafe to rely upon the evidence of the prosecution witnesses without any independent corroboration which is lacking in this case. There was no evidence on the record that the charas was in safe custody for one month in *Malkhana* of the Police Station. In this respect, rightly reliance has been placed upon the case of *Muhammad Abbas v. The State reported in 2008 Cr.L.J 26*. Relevant portion is reproduced as under:-

“After hearing the learned counsel for the parties and going through the record we have straightaway observed that although the alleged recovery of narcotic substance from the appellant’s possession had been effected on 29.6.1998 yet none of the prosecution witnesses had uttered even a single word as to what had happened to the recovered substance after its recovery and with whom the same had been deposited for safe custody. It was only Muhammad Ramzan, FC (PW4) who had stated before the learned Trial Court that on 13.7.1998 he had been handed over two parcels said to contain heroin and Charas by Moharir Head Constable of the relevant Police Station for onward transmission to the office of the Chemical Examiner which he delivered there on the same day. The report of the Chemical Examiner (Exhibit-PE), however, shows that the docket of the samples of the recovered substance had been prepared on 6.7.1998 and the said samples had been dispatched by the Excise & Taxation Officer, Sheikhpura and not by the local police. We have required the learned counsel for the State to explain as to who the samples of the recovered substance had come in the hands of the Excise & Taxation Officer, Sheikhpura and what was the evidence available on the record to confirm that the same had been kept in safe custody while in possession of the Excise & Taxation Officer, Sheikhpura but after going through the record of the case from cover to cover he has categorically conceded that there

is no evidence whatsoever available on the record in those respects. In such a state of the evidence available on the record safe custody of the recovered substance or its samples is not discernable from the record of this case and, thus, we have found it to be extremely unsafe to uphold and maintain the appellant's convictions and sentences recorded by the learned Trial Court. This appeal is, therefore, allowed, the convictions and sentences of the appellant recorded by the learned Trial Court are set aside and he is acquitted of the charge by extending the benefit of doubt to him. He shall be released from the jail forthwith if not required in any other case."

13. There is also over writing in the memo of chemical examiner at Ex.7A. Regarding the grams of charas consumed in the analysis, as well as, the Head Constable who had brought the charas to the chemical examiner, the Prosecution's case is also full of doubts. It is settled law that even a single circumstance which creates doubt in the prosecution case is sufficient for extending the benefit of doubt in favour of the accused as held in the case of Tariq Pervaiz v. The State (1995 SCMR 1345).

14. For the above stated reasons and while relying upon the authorities cited above, we have no hesitation to hold that the prosecution has utterly failed to prove its case against the accused. We therefore, allow this appeal and acquit the appellant of the charge by extending him benefit of doubt. Appellant is present on bail, his bail stands cancelled and surety is hereby discharged.

JUDGE

JUDGE

Tufail

