

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

Cr.Appeal.No.D- 17 of 2015

Present:-

Mr. Justice Naimatullah Phulpoto.  
Mr. Justice Zulfiqar Ahmed Khan.

Date of hearing: 25.04.2017.  
Date of judgment: 25.04.2017.

Appellant Anwer s/o Perchi  
By caste Samoon.  
(present on bail)

Through Mr. Ishrat Ali Lohar,  
Advocate.

The State:

Through Syed Meeral Shah, D.P.G.

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

***NAIMATULLAH PHULPOTO, J:*** This appeal is directed against the judgment dated 23.02.2015 passed by learned Special Judge for CNS Umerkot, whereby the appellant Anwer son of Perchi Samoon has been convicted u/s 9(c) of CNS Act, 1997 and sentenced to suffer RI for 08 years and to pay the fine of Rs.20,000/- In case of default in payment of fine he was ordered to suffer SI for 02 month more. 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 02.03.2014 SHO Police Station Umerkot city left PS alongwith his subordinate staff vide roznamcha entry No.20 at 2030 hours for patrolling. While patrolling at different places when they reached at Kharoro bye-pass link road on

Umerkot-Mirpurkhas, where it is alleged that police party stated checking and at about 2135 hours present accused appeared on motorcycle from Mirpurkhas side. He was signaled to stop. He on seeing the police tried to run away but he was apprehended by the police. On inquiry he disclosed his name as Anwer son of Perchi Samoon. SIP Ghulam Hussain Mashoori conducted the personal search of accused and secured a shopper from the fold of his shalwar in the presence of the mashirs ASI Muhammad Boota and PC Ransingh. Shopper bag was opened it contained three slabs and 10 pieces of charas which was weighed it was 1100 grams charas. From the further personal search of accused cash of Rs.340/- was also recovered. 20 grams of charas was separated for sending the same to the chemical examiner. Sample and the remaining property were separately sealed. Mashirnama of arrest and recovery was prepared. Thereafter, accused and case property were brought at Police Station. FIR bearing crime No.18/2014 was lodged against the accused by SIP Ghulam Hussain Mashoori on behalf of State for offence u/s 9(c) of CNS Act, 1997.

3. During investigation, Investigation Officer recorded 161 Cr.P.C. statements of the PWs. 20 grams of the substance / charas was sent to the chemical examiner on 10.03.2014 He dispatched the sample to the chemical examiner for report through PC Odho 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.2 u/s 9(c) of CNS Act, 1997. To which, accused pleaded not guilty and claimed to be tried. At the trial prosecution examined PW-1 Complainant / SIP Ghulam Hussain Mashoori at Ex.3. He produced mashirnama of arrest and recovery at Ex.3/A, FIR at Ex.3/B, departure entry No.20 at Ex.3/C and arrival entry No.22 at

Ex.3/D, PW-2 mashir ASI Muhammad Boota at Ex.4 and PW-3 IO/SIP Ghulam Hyder at Ex.5. He produced report of the chemical examiner at Ex.5/A. Thereafter, prosecution side was closed at Ex.6.

5. Statement of accused was recorded u/s 342 Cr.P.C.at Ex.7. Accused denied all the incrementing pieces of evidence against him and stated that PWs have deposed against him as they are the police officials and interested. Accused neither examined himself on Oath in disproof of prosecution allegations nor led any evidence in his defence. However, in a question that have you anything else to say, accused replied as under:-

***“I am innocent. I have been falsely implicated by complainant at instance of my political rival. Complainant had foisted case upon me. Nothing was secured from my possession. On 26.02.2014 I was arrested in connection with abduction of one Tulsu Das and such news was published in the daily Kawish dated 27.02.2014. I produce such copy as Ex.7/A. I was not implicated by the witnesses in the above abduction case therefore, police falsely implicated me in this case at instance of my rival.”***

6. 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.

7. We have carefully heard Mr. Ishrat Ali Lohar, learned advocate for appellant, Syed Meeral Shah, learned D.P.G. for the State and scanned the entire evidence.

8. Mr. Ishrat Ali Lohar, learned advocate for appellant has mainly contended that according to mashirnama of incident 03 big and 10 small pieces of charas total 1100 grams was recovered from the fold of Shalwar of the accused and sample was drawn from the each piece but in the evidence of SIP Ghulam Hussain and mashir ASI Muhammad Boota it has not come on record that samples were drawn from each piece. Counsel for the appellant argued that both complainant and mashir have deposed that the sample was

not taken from one big piece of charas. It is submitted that there is clear discrepancy in the prosecution story. It is also contended that the place of incident was though main road but no efforts were made by the complainant to make some independent person as mashir in this case. It is further contended that according to the prosecution case recovery was made on 02.03.2014 but the sample was sent to the chemical examiner on 10.03.2014. Safe custody of the charas during said period has not been established by cogent and confidence inspiring evidence. It is also contended that the according to the Investigation Officer case property was sent to the chemical examiner through PC Odho but in the report of chemical examiner it is mentioned that he has received the property through ASI Muhammad Boota. Counsel for the appellant argued that PC Odho has not been examined by the prosecution. Counsel for the appellant lastly contended that accused was detained at Police Station before the registration of this case. He referred to the news cutting produced by the accused in his statement recorded u/s 342 Cr.P.C. at Ex.7/A. In support of his contentions, learned counsel has placed reliance on the case of *Tariq Pervez V/s. The State (1995 SCMR 1345)* and *Muhammad Hashim v. The State (PLD 2004 Supreme Court 856)*.

9. Syed Meeral Shah, learned D.P.G. argued that complainant Ghulam Hussain has fully implicated the accused that 1100 grams charas was recovered from the possession of accused and mashir ASI Muhammad Muhammad Boota has supported the case of prosecution. It is further contended that report of the chemical examiner was positive. Learned D.P.G. further contended that there are minor contradictions and infirmities in the case of prosecution which would not be fatal to the prosecution case. He has supported the impugned judgment.

10. We have carefully heard the learned counsel for the parties and scanned the entire evidence.

11. From the perusal of evidence of complainant SIP Ghulam Hussain Ex.3, it transpires that he alongwith his subordinate staff left PS on 02.03.2014 for patrolling duty and arrested the present accused on road and recovered 1100 grams charas from the fold of his Shalwar. He weighed the charas in presence of the mashirs and separated 20 grams for chemical examiner but in the mashirnama Ex.3/A it is mentioned that in all there were three big and 10 small pieces of charas and from all the pieces small quantity of charas totaling 20 grams was sent to the chemical examiner. Mashir ASI Muhammad Boota has also deposed that he was accompanied with SIP Ghulam Hussain on 02.03.2014 and from the possession of accused recovered 1100 grams charas. He has also stated that sample was drawn from each piece. According to the chemical examiner parcel which he had received it contained thirteen greenish brown semi soft pieces with smell of charas. From the prosecution evidence it is very much clear that there is nothing available on record to show whether sample for the chemical examiner was taken from the each piece to ascertain that the all the 13 pieced recovered from the accused was charas of the same consignment. It is also matter of record that the charas was recovered from the possession of accused on 02.03.2014 but the sample was sent to the chemical examiner on 10.03.2014. According to the Investigation Officer he had sent the sample through PC Odho who has not been examined by the prosecution but the chemical examiner report Ex.5/A shows that it has been received by the chemical examiner through ASI Muhammad Boota. In these circumstances, it was the duty of the prosecution to prove that the sample was in safe custody between 02.03.2014 to 10.03.2014. Moreover, it has been admitted by the complainant and mashir that no sample was taken from one big rod for the

reasons best known to the prosecution. It would also be fatal to the prosecution case that no sample was taken from the big piece and it would not be possible to hold that the said piece was charas or otherwise. Accused has raised defence plea that he was under arrest at the time of registration of this case in the alleged abduction of one Tulsi Das and accused has produced news cutting dated 27.02.2014 in which it is mentioned that in an abduction case accused Anwer has been arrested by the SHO PS Shor. In view of the specific plea raised by the accused, we are unable to rely upon the evidence of the prosecution witnesses without any independent corroboration which is lacking in this case. Moreover, under the provisions of the Control of Narcotic Substance Act, 1997 stringent sentences have been provided only if offences under Section 9 of the said Act is proved. Therefore, provisions of Act 1997 have to be construed strictly.

There is also no evidence on record that the charas was in safe custody in police Malkhana in between 02.03.2014 to 10.03.2014. Rightly reliance has been placed 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.”

12. For the above stated reasons, we have no hesitation to hold that in this case there are several circumstances which create doubt 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.”***

13. For the above stated reasons, we hold that prosecution has failed to prove its' case against the accused. While extending the benefit of doubt, appeal is allowed. The conviction and sentence recorded by the trial court are set aside. Appellant is acquitted of the charge. Appellant is on bail, his bail bond stands canceled and surety is hereby discharged.

JUDGE

JUDGE

Tufail





