

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

Cr.Appeal.No.D- 18 of 2015

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

Date of hearing: 04.05.2017.  
Date of judgment: 04.05.2017.

Appellant Irshad Ali s/o  
Jeevan by caste Zardari.  
(present on bail)

Through Mr. Anwar H. Ansari,  
Advocate.

The State:

Through Mr. Shahzado Saleem  
Nahiyoan, A.P.G.

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

***NAIMATULLAH PHULPOTO, J:*** Appellant was tried by the learned Sessions Judge / Special Court for CNS Shaheed Benazirbad in Special Case No.300 of 2014. By judgment dated 28.02.2015, appellant was convicted u/s 9(b) of CNS Act, 1997 and sentenced to suffer RI for 01 year and 03 months and to pay the fine of Rs.9,000/- In case of default in payment of fine, he was ordered to suffer SI for three months. However, the 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 14.03.2014 SIP Ghulam Shabir left police station alongwith his subordinate

staff namely PCs Khalid Parvez and Nisar in the Government vehicle vide roznamcha entry No.40 at 0730 hours. While patrolling at the various places when the police party reached near Linepar Nawabshah where police party saw the present accused standing there. He was carrying a plastic bag in his hand who while seeing the police party tried to run away but he was surrounded and caught hold by the police. SIP secured the shopper from possession of accused and tried to call the private persons. On account of non-availability of the private persons, he made PCs Khalid and Nisar Ahmed as mashirs and inquired the name of the accused, to which he disclosed his name as Irshad s/o Jiwan Khan Zardari r/o Village Datto Zardari Taluka Nawabshah. Plastic bag was opened. It contained a piece of charas. It was weighed and the weight became 250 grams, out of it, it is alleged that 50 grams were separated for sending to the chemical examiner. Personal search of the accused was also conducted and cash of Rs.80/- was recovered from him. Mashirnama of arrest and recovery was prepared in presence of the mashirs. Thereafter, accused and the case property were brought at police station where the FIR was lodged against the accused bearing Crime No.21 of 2014 PS B-Section Nawabshah u/s 9(b) of CNS Act, 1997.

3. During investigation 161 Cr.P.C. statements of the PWs were recorded. Sample was sent to the chemical examiner. Positive report was received. On the conclusion of investigation challan was submitted against the accused u/s 9(b) of CNS 1997.

4. Trial Court framed charge against accused at Ex.5 u/s 9(b) of CNS Act, 1997. Accused met with the charge with denial.

5. In order to substantiate the charge, prosecution examined PW-1 Complainant / SIP Ghulam Shabir Chan at Ex.7. He produced the mashirnama of arrest and recovery as Ex.7/A, FIR at Ex.7/B, simple attested

copy of roznamcha entry of departure and photo attested copy of arrival at P.S. at Ex.7/C-1 & 2, chemical report at Ex.7/D, PW-2 mashir PC Khalid Parvez at Ex.8. Thereafter, prosecution side was closed at Ex.9.

6. Statement of accused was recorded u/s 342 Cr.P.C.at Ex.10, to which accused claimed false implication in this case and denied the prosecution allegations. Accused denied his arrest at the place as mentioned by the prosecution witnesses. However, plea was raised by the accused that PWs are police officials and they have deposed against him at the instance of Line Officer as appellant has dispute over the quarter with him. Accused has claimed that he is police constable in Police Line Shaheed Benazirabad. Accused did not lead any evidence in his defence nor he examined himself on Oath.

7. Learned trial court after hearing the learned advocate for the accused and learned prosecutor and examining the evidence available on record convicted and sentenced the appellant as stated above.

8. Brief facts of the prosecution and the evidence finds an elaborate in the judgment of the trial court and need not to repeat the same to avoid repetition.

9. Mr. Anwar H. Ansari, learned advocate for appellant has mainly contended that the Sub-Inspector has foisted the charas upon the accused at the instance of Line Officer. He further argued that the appellant was the police constable and he had dispute with the Line Officer over the quarter. It is submitted that the fact that the appellant is police constable, PWs have suppressed this fact malafidely. It is also contended that according to the case of prosecution charas was recovered from the possession of accused on 14.03.2014 but it was sent to the chemical examiner on 21.03.2014 through

PC Amanullah. It is contended that the charas was not in safe custody and the delay in sending the charas to the chemical examiner has not been explained by the prosecution. Even PC Amanullah who had taken the charas to the chemical examiner has also not been examined by the prosecution. Learned counsel further submits that there are material contradictions in the evidence of the complainant and mashir. He referred to the evidence of complainant and stated that complainant has deposed that he did not send any police constable for calling the private persons but the mashir stated that efforts were made to collect the private persons. He further highlighted the contradiction that the complainant has deposed that FIR and 161 Cr.P.C. statements were written by WHC but on the same point mashir deposed that these documents were prepared by complainant / I.O. Lastly, it is contended that mashir has deposed that property was not sealed at the spot but it was sealed at police station. In support of his contentions, learned counsel has placed reliance on the case of *Tariq Pervez V/s. The State (1995 SCMR 1345)*.

10. Mr. Shahzad Saleem Nahiyoan, A.P.G. appearing for the State argued that the prosecution has proved its case and the trial court has rightly appreciated the evidence of the prosecution. He has contended that contradictions as highlighted by the learned counsel for the appellant are minor one. Evidence of the police officials is corroborated by chemical examiner's report. He has supported the judgment of the trial court.

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 appellant.

12. We have come to the conclusion that the prosecution has failed to prove its against the accused for the reasons that according to the case of the

prosecution, accused was arrested on 14.03.2014 and the investigation was carried out by Sub-Inspector Ghulam Shabir. He did not bother to know that the accused is also a police constable in the Police Department. It reflects malafide on the part of complainant / I.O. According to the case of prosecution, charas was recovered from the possession of accused on 14.03.2014 but the sample was sent to the chemical examiner on 21.03.2014, delay has not been explained by the prosecution. Even no evidence has been brought on record to satisfy the court that the charas was in safe custody during that period. According to the report of the chemical examiner the charas was delivered by PC Amanullah to the chemical examiner but PC Amanullah has not been examined by the prosecution. Moreover, according to the case of prosecution, charas was sealed by Sub-Inspector at the spot after recovery from the possession of accused but mashir stated that the charas was sealed at the police station. The defence plea raised by the accused that he is a police constable and he has dispute with the Line Officer over quarter and at the instance of Line Officer has been involved in this case falsely. In these circumstances, the case of prosecution required independent corroboration, which is lacking in this case. It was the case of spy information and the SHO had sufficient time for calling the independent persons of the locality but he deliberately avoided. WHC of the police station with whom the case property was deposited has not been examined so also the PC who has taken the sample to the chemical examiner has also not been examined by the prosecution in order to satisfy the court that the charas was in safe custody. In this regard reference can be made to 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.”

13. We therefore, hold that the 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. Appellant had raised plea that he was involved in this case falsely at the instance of Line Officer due the dispute over the quarter but such plea was not considered by the trial court at the time of trial.

14. There are several circumstances in this case which created 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. In view of the above facts and circumstances of the case, we have no hesitation to hold that the prosecution has failed to prove its case against the accused beyond any reasonable doubt. Therefore, while extending 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 cancelled and surety is hereby discharged.

JUDGE

JUDGE

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