

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

Cr.Appeal.No.D- 53 of 2018

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

Appellant : Khadim Hussain s/o Khabhar Khan by caste
Wassan through Mr. Ishrat Ali Lohar, Advocate.

Respondent : The State
through Mr. Shahzado Saleem Nahiyoon,
D.P.G.

Date of hearing : 24.05.2018

Date of judgment : 28.05.2018

J U D G M E N T

NAIMATULLAH PHULPOTO, J: Khadim Hussain appellant was tried by learned Special Judge (Narcotics), Shaheed Benazirabad in Special Case No. 601 of 2017. On conclusion of trial, vide judgment dated 18.04.2018, appellant was convicted u/s 9 (c) of CNS Act, 1997 and sentenced to 03 years R.I and to pay fine of Rs.15,000/-. In case of default in payment of fine, appellant was ordered to suffer S.I for 05 month more. Appellant was extended benefit of Section 382-B Cr.P.C.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 27.07.2017 at 0945 hours, complainant/SIP Maqsood Ahmed Channa of PS Dour, received spy information that the present appellant was selling charas near Dargah Jalal Pir. SIP alongwith his sub-ordinate staff reached there and saw the present appellant having one black colour

shopper in his hand, who on seeing the police party tried to run away but was surrounded and caught hold. SIP Maqsood Ahmed recovered 1915 grams charas from the possession of accused so also cash of Rs.150/- Such mashirnama was prepared in presence of mashirs ASI Ghulam Murtaza Mari and PC Saleem Raza. Thereafter, accused and case property were brought at police station where FIR was lodged against the accused vide Crime No.82/2017 at P.S. Dour under section 9 (c) of CNS Act, 1997.

3. During investigation, charas was sent to the chemical examiner for analysis and report on 27.07.2017, through PC Dilmurad. Positive report of the chemical examiner was received by I.O. On the conclusion of usual investigation, challan was submitted against the appellant/accused u/s 9 (c) of CNS Act, 1997.

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

5. At the trial, prosecution examined three witnesses in this case i.e. complainant/I.O, mashir and PC Dilmurad, who had taken sample to the chemical examiner. Thereafter, prosecution side was closed.

6. 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. Accused produced some documents in his defence and raised plea that he was victim of enmity with SHO Maqsood Ahmed Channa, who has lodged this false FIR against him as the said SHO had enmity with Mumtaz Brohi, who is the friend of present appellant. Constitution petition was filed by Mumtaz Brohi against SHO

before this court. Accused neither examined himself on Oath nor led any evidence in his defence, in disproof of the prosecution allegations.

7. Learned Special Judge after hearing the learned counsel for the parties and examining the evidence available on record, by judgment dated 18.04.2018 convicted and sentenced the appellant as stated above. Hence, this appeal is filed.

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

9. 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.

10. Mr. Ishrat Ali Lohar, learned advocate for the appellant in support of his contentions made following submissions:-

- i. That according to the case of prosecution 4 pieces were recovered weight/size of each piece separately has not been mentioned.
- ii. That according to the complainant/Investigation Officer accused was carrying black colored shopper when he was arrested whereas the Chemical Report reflects that case property was received in white colored shopper.
- iii. That according to the case of prosecution accused was selling charas at Dargah of Jalal Peer. It was day time but no private person from the vicinity was associated as mashir.
- iv. That complainant/Investigation Officer did not inspect the place of wardat during investigation.
- v. That complainant did not mention the description of the accused as soon as he received spy information in roznamcha then how he identified the accused at the place of his arrest.

- vi. That after registration of the F.I.R. against Appellant another F.I.R. was lodged by same S.H.O. against one Mumtaz Brohi both were friends and reside in the same vicinity.
 - vii. That Mumtaz Brohi had filed Constitutional Petition before this Court against S.H.O. and S.H.O. approached Appellant for private settlement with Mumtaz Brohi being his friend but no settlement was arrived at, S.H.O. lodged F.I.R. against Appellant as well as against Mumtaz and narcotics was foisted upon them.
 - viii. That there are material contradictions in the evidence of P.Ws on material particulars of the case.
 - ix. That in the mashirnama description of the charas has not been mentioned whereas in the evidence description of the charas and monogram have been mentioned.
 - x. That P.W.1 in the cross examination has replied that case property was not sealed at spot.
 - xi. That no evidence regarding safe custody of the recovered charas in the Malkhana.
11. Mr. Shahzado Saleem Nahiyoon, D.P.G for the State during arguments admitted that PW.1 has replied in 161 Cr.P.C. statement that case property was not sealed. Learned D.P.G. admitted that there was no evidence with regard to safe custody of charas at P.S and safe transit. Learned D.P.G half heartedly opposed the appeal.
12. After hearing the learned counsel for the parties, we have carefully perused the entire evidence.
13. Record reflects that complainant received spy information that the present accused was selling charas near Dargah. Thereafter, he alongwith other subordinate staff reached at the pointed place for arrest of the accused. Police arrested the accused, who was carrying black

plastic shopper containing charas 1915 grams. According to the case of prosecution, charas was kept at police station Dour but incharge/Head Mohrer of Malkhana has not been examined before the trial court to prove the safe custody of charas at Malkhana. Accused in his statement recorded u/s 342 Cr.P.C. has claimed false implication in this case at the instance of SHO Maqsood Ahmed Channa, with whom his friend Mumtaz Brohi was on inimical terms and he has been involved in this case just being the friend of said Mumtaz Brohi. According to the case of prosecution, 4 pieces were recovered but weight/description of each piece separately has not been mentioned. There are also material contradictions in the evidence of prosecution. According to evidence of complainant/Investigation Officer, accused was carrying black colored shopper when he was arrested. Chemical Report reflects that case property was received in office of Chemical Examiner in white colored shopper, it has created doubt in the case of prosecution. It is the case of prosecution that accused was selling charas at Dargah of Jalal Peer. It was day time but no private person of the vicinity was associated to act as mashir of recovery proceedings though it was the case of spy information. It has come on record that after registration of F.I.R. against appellant, another F.I.R. was lodged by same S.H.O. against one Mumtaz Brohi, who is the friend of appellant and both reside in the same vicinity. Mumtaz Brohi had filed Constitutional Petition before this Court against S.H.O. and S.H.O. approached the present appellant for private settlement with Mumtaz Brohi being his friend but no settlement was arrived at, it is defence plea that S.H.O. lodged F.I.R. against appellant as well as against Mumtaz Brohi and narcotics was foisted upon them. Moreover, there are material contradictions in the evidence of prosecution

witnesses. In the mashirnama of arrest and recovery description of the charas has not been mentioned, whereas in the evidence description of the charas and monogram have been mentioned. P.W.1 in the cross examination has replied that case property was not sealed at spot it was fatal for prosecution. No evidence regarding safe custody of the recovered charas in the Malkhana has been brought on record. Under these circumstances, we are unable to rely upon the evidence of police officials without independent corroboration, which is lacking in this case. No doubt, positive report of the chemical examiner has been produced in the evidence. A perusal of the chemical report at Ex.04/F reflects that it was not prepared by the Chemical Examiner according to protocol required in the rules. As such positive report would not improve the case of prosecution. Rightly reliance has been placed upon 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."

14. 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 *Muhammad Mansha V/s. The State* (2018 SCMR 772), wherein the Honourable Supreme Court has observed as follows:-

"Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent

person be convicted". Reliance in this behalf can be made upon the cases of Tariq Pervez v. The State (1995 SCMR 1345), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), Muhammad Akram v. The State (2009 SCMR 230) and Muhammad Zaman v. The State (2014 SCMR 749)."

15. In view of the above, we have no hesitation to hold that the prosecution has failed to prove its' case against the accused. Resultantly, instant appeal is allowed. Conviction and sentence recorded by the trial court vide judgment dated 18.04.2018 are set aside and appellant is acquitted of the charge. Appellant Khadim Hussain s/o Khabhar Khan by caste Wassan is in custody, he shall be released forthwith, if he is not required in some other case.

JUDGE

JUDGE

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