

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

Cr.Appeal.No.D- 57 of 2015
Cr.Appeal.No.D- 58 of 2015

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

Date of hearing: 09.05.2017.
Date of judgment: 12.05.2017.

1. Appellant Mst. Hajani
w/ o Muhammad Ali
by caste Babar

2. Appellant Abdul Ghani s/o Abdul Azeem by caste Babar.
(both present on bail) Through Mr. Wali Muhammad Jamari,
Advocate.

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

J U D G M E N T

NAIMATULLAH PHULPOTO, J: Appellants were tried by learned Sessions Judge / Special Court for CNS Tando Muhammad Khan for offence u/s 9(c) of CNS Act, 1997. By judgment dated 09th June 2015, the appellant Mst. Hajani was convicted and sentenced to suffer RI for 04 years and 06 months and to pay the fine of Rs. 25,000/- In case of default SI for five months more. Appellant Abdul Ghani was also convicted and sentenced to suffer R.I for one year and three months and to pay the fine of Rs.9000/- In case of default in payment of fine, he was ordered to suffer SI for 04 months

and 16 days. Benefit of Section 382-B Cr.P.C. was also extended to both the accused.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 26.03.2014 SHO / Inspector Nandlal was present at PS Mulakatiar. He received spy information that present appellants while carrying charas were passing towards Mulankatiar. On such information, SHO alongwith his subordinate staff namely PCs Muhammad Usman, Muhammad Yameen, LPC Samreen and HC Wahid Bux left police station vide roznamcha entry No.12 at 1705 hours and proceeded to the pointed place. Police party reached near the Irrigation office at 1715 hours where they saw two persons (male and female) coming on the motorcycle. Police party signaled them to stop. Motorcycle was stopped. Both the accused were caught hold finding them in suspicious manner. On inquiry, male accused disclosed his name as Abdul Ghani s/o Abdul Azeem by caste Babar and female accused disclosed her name as Mst. Hajani w/o Muhammad Ali by caste Babar. Personal search of accused Abdul Ghani was conducted in presence of the mashirs PC Muhammad Usman and HC Wahid Bux, from the right side of his shalwar one white plastic bag was recovered. It contained one piece of charas. From his possession cash of Rs.800/- was also recovered. Charas was weighed it was 245 grams. Personal search of accused Mst. Hajani was conducted by the LPC/mashir Samreen. From the pocket of her shirt two plastic thellis/bags were recovered and two pieces of charas were recovered. Cash of Rs.1500 was also recovered from her possession. Charas was weighed, it was 1030 grams. Out of it, it was alleged that 10 grams were separated as samples for sending the same to the chemical examiner. Remaining 235 grams charas were sealed separately. From two pieces of charas recovered from the accused Mst. Hajani 35 grams were separately sealed for sending to the chemical examiner. 995 grams were separately sealed. Motorcycle No. Nil

was also seized u/s 550 Cr.P.C.

On inquiry, both the accused disclosed that they had purchased the charas from one Ghulam Nabi. Mashirnama of arrest and recovery was prepared. Both the accused were brought to the police station. SHO Nandlal lodged FIR against accused Mst. Hajani on behalf of the State vide Crime No.6/2014 u/s 9 (c) of CNS Act 1997. Separate FIR against accused Abdul Ghani u/s 9 (b) of CNS Act, 1997 was registered.

3. After registration of the aforesaid FIRs against both the accused, investigation was entrusted to SIO Ghulam Nabi of PS Tando Ghulam Hyder. Copy of FIRs, mashirnama of arrest and recovery, case property and the custody of accused were handed over to the Investigation Officer. I.O visited the place of wardat in presence of the mashirs PC Rafique Ahmed and DPC Mir Muhammad. Samples were sent to the chemical examiner for analysis and positive report was received. On the conclusion of usual investigation challans were separately submitted against accused Abdul Ghani and accused Mst. Hajani under above referred sections.

4. Charge against accused Abdul Ghani was framed at Ex.2 u/s 9(b) of CNS Act, 1997. Charge against accused Mst. Hajani was framed at Ex.2 u/s 9(c) of CNS Act, 1997. To which both the accused pleaded not guilty and claimed to be tried.

5. At the trial of accused Adul Ghani, prosecution examined PW-1 Complainant / Inspector Nandlal Maheshwari at Ex.6, who produced attested carbon copy of roznamcha entry Nos. 12 and 14, attested carbon copy of memo of arrest and recovery and FIR at Ex.16/A to 16/D, PW-2 mashir PC Muhammad Usman at Ex.7 and PW-3 IO/SIP Ghulam Akbar Chhalgri at Ex.8, who produced roznamcha entry No.10, memo of vardat and chemical

examiner reports dated 08.04.2014 and 14.04.2014 respectively. Thereafter, prosecution side was closed.

6. Statement of accused Abdul Ghani was recorded u/s 342 Cr.P.C. at Ex.10. Accused claimed false implication in this case and denied the prosecution allegations. Accused stated that PWs have deposed against him due to enmity with the irrigation officials. Appellant / accused has produced Photostat copies of the orders dated 28.10.2014 passed in criminal miscellaneous application No.500/2014 (re-Abu Bakar v. The State). Accused did not lead any defence and declined to give statement on oath in disproof of the prosecution allegations.

7. At the trial of accused Mst. Hajani, prosecution examined PW-1 Complainant / Inspector Nandlal Maheshwari at Ex.6, who produced roznamcha entries Nos.12 and 14, memo of arrest and recovery and FIR at Ex.6/A to 6/D, respectively, PW-2 mashir PC Muhammad Usman at Ex.7 and PW-3 IO/SIP Ghulam Akbar Chhalgri at Ex.8, who produced roznamcha entry No.10, memo of vardat and chemical examiner reports dated 08.04.2014 and 14.04.2014 respectively at Ex.8/A to 8/D respectively and PW-4 LPC Sameen Talpur at Ex.9. Then the prosecution side was closed.

8. Statement of accused Hajani was recorded u/s 342 Cr.P.C. at Ex.10. She claimed false implication in this case and denied the prosecution allegations. Accused raised plea that she has been involved in this case falsely on account of enmity with the irrigation officials. Mst Hajani stated that she has been involved falsely at the instance of her brother-in-law Ghulam Rasool. She has produced some photocopies of the documents.

9. Learned trial court after hearing the learned counsel for the parties and examining the evidence available on record, by separate judgments convicted and sentenced the appellants as stated above. Hence these appeals.

10. We intend to decide both the appeals by single judgment as the facts, evidence and the impugned judgment in both the appeals is same.

11. Mr. Wali Muhammad Jamari, learned advocate for appellants mainly contended that it was the case of spy information but SHO failed to call private persons from the irrigation office to witness the recovery proceedings. It is contended that the charas was recovered from the possession of accused on 26.03.2014 and samples were sent by the Investigation Officer to the chemical examiner on 28.03.2014 through PC Inayatullah Khan but prosecution has failed to examine the WHC of the police station incharge of Malkhana and PC Inayatullah who had taken the charas to the chemical examiner to prove the safe custody of the charas. It is also contended that there was over witting in the rorznamcha entry No.17 produced before the trial court. Learned counsel for the appellants argued that the investigation officer has been declared hostile and the case of prosecution was doubtful. Learned counsel further argued that the trial court has committed illegality by recording the evidence of SHO Nandlal, PC Muhammad Usman and the Investigation Officer in the case of accused Abdul Ghani and same evidence has been placed on record in the case of Mst. Hajani. According to learned counsel for the appellants, at the time of recording the evidence of prosecution witnesses in the case of accused Abdul Ghani, Mst. Hajani was not present in the court and such evidence cannot be used against her recorded in other case. Lastly, it is contended that there are material contradictions in the evidence of prosecution with regard to the availability of the private witnesses at the time

of arrest of the accused. In support of his contentions, he has placed reliance upon the cases of *Tariq Pervez V/s. The State (1995 SCMR 1345)*, *Ikramullah & others v/s. the State (2015 SCMR 1002)* and *Ali Murad v. The State (2013 YLR 1010) (Sindh)*.

12. Syed Meeral Shah, learned D.P.G. conceded to contentions of the defence counsel and argued that evidence recorded in the case of accused Abdul Ghani has been placed in the case of accused Mst. Hajani, it was not permissible under law. Learned D.P.G. further admitted that there was no evidence regarding the safe custody of the samples in Malkhana of the police station and no police official who had taken sample to the chemical examiner has been produced before the trial court. Learned D.P.G did not support the impugned judgment.

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

14. From close scrutiny of evidence we have come to the conclusion that prosecution has failed to prove its' case for the reasons that there are material contradictions in evidence of the prosecution witnesses with regard to the presence of the private persons around the place of arrest of the accused. We have noticed that there is over writing in the arrival entry No.17 of the police station Mulakatiar. We find legal force in the contention of the defence counsel that the tampering has been made in record to improve the prosecution story. We have carefully perused the evidence of SHO Nandlal, PC Muhammad Usman and Investigation Officer Ghulam Akbar. It appeared that the accused Abdul Ghani and Mst. Hajani were tried separately but the

trial court recorded the evidence in one case and same evidence has been placed in other case. Learned advocate for the appellant has argued that the prosecution evidence was recorded in presence of one accused and in absence of another accused. Law is settled by now that the evidence shall be recorded in presence of the accused. The evidence recorded in absence of the accused cannot be used as a piece of evidence against him. From the evidence it came on surface that separate case properties during trial were not produced before the trial court. It is the matter of record that the charas was recovered from the possession of both accused and the samples were sealed separately and remaining charas was sealed separately but no different description has been mentioned. It cannot be said with certainty that the property produced before the trial court was the infact property recovered from the possession of which accused. Appellant Mst. Hajani has raised plea that her husband expired during the service and her son applied in the irrigation department on deceased quota. Fraud was committed with her by one clerk of the Irrigation Department and some other person was appointed. Appellant raised hue and cry. Case has been registered against her, to withdraw from her claim.

15. In any case, the burden lies upon the prosecution to prove its' case beyond the reasonable doubt. The Investigation Officer has been declared hostile. There was no evidence that the charas was kept in safe custody. The constable, who had taken the charas to the chemical examiner has not been examined by the prosecution. There was overwriting in the arrival entry so also the material contradictions in the evidence of the prosecution. Learned D.P.G. has conceded that there was no evidence that the charas was kept in the safe custody.

16. For the above stated reasons 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.”

17. For the above stated reasons, we have no hesitation to hold that in this case there are several circumstances which created 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.”

18. For the above stated reasons, we hold that prosecution has not been able to prove its case beyond any reasonable doubt against the appellants / accused. Thus, conviction and sentence recorded by the trial court vide judgment dated 09th June 2015 are set aside. Consequently, the appeals are

accepted. Appellants are on bail. Their bail bonds stand cancelled and sureties are hereby discharged.

JUDGE

JUDGE

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