

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

Cr.Appeal.No.D- 36 of 2014

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

Date of hearing: 16.05.2017.
Date of judgment: 16.05.2017.

Appellant Zafar-u-ddin @ Zafar s/o
Juma Khan by caste Ghori.
(present on bail).

Through Syed Babar Ali Kazmi,
Advocate.

The State:

Through Syed Meeral Shah, Additional
Prosecutor General.

J U D G M E N T

NAIMATULLAH PHULPOTO, J: Appellant Zafaruddin alias Zafar s/o Juma Khan was tried by learned Illrd Additional Sessions Judge / Special Court for CNS Hyderabad in Special Case No.15 of 2012. By judgment dated 10.03.2014, appellant was convicted u/s 9(c) of CNS Act, 1997 and sentenced to 07 years RI and to pay the fine of Rs.10,000/- In case of default in payment of fine, he was ordered to suffer SI for 30 days. However, the benefit of Section 382-B Cr.P.C. was also extended to the accused.

2. Brief facts leading to the filing of present appeal are that on 26.01.2012 SIP Malak Sher Ali of PS Hali Road left police station alongwith his

subordinate staff vide roznamcha entry No.18 at 1340 hours for patrolling duty. While patrolling at various places when they reached at Fateh Chowk Cotton Mill, SIP received spy information that the present accused was selling charas in a open plot at grain down. Police party after receipt of such information proceeded to the pointed place where they saw the present accused standing there who on seeing the police party tried to run away but he was surrounded and caught hold. On inquiry he disclosed his name as Zafar s/o Juma Khan by caste Ghori r/o Hali Road, Hyderabad. It is alleged that the private persons were not available there therefore SHO made PCs Pir Bux and Ismail as mashirs and conducted the personal search of accused. From his possession three big pieces of charas were recovered. Weight of substance recovered from the accused was 1050 grams, out of it, it is alleged in the FIR that 10 grams charas were separated for sending to chemical examiner for analysis. Reaming charas was sealed separately. Thereafter, sample as well as the remaining charas was sealed in presence of the mashirs. Mashirnama of arrest and recovery was prepared in presence of the mashirs. Thereafter, accused and case property were brought at Police Station. FIR bearing crime No.18/2012 was lodged against the accused by SIP Malak Sher Ali on behalf of State for offence u/s 9(c) of CNS Act, 1997.

3. During the investigation, Investigation Officer recorded 161 Cr.P.C. statements of the PWs. Case property was sent to the chemical examiner on 28.01.2012 for analysis and he received the positive report. After completion 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.3 u/s 9(b) of CNS Act, 1997. To which, accused pleaded not guilty and claimed to be tried.

5. In order to substantiate its case prosecution examined PW-1 complainant SIP Malak Sher Ali at Ex.4, who produced the FIR at EX.4/A, departure entry at Ex.4/B, mashirnama of arrest and recovery at Ex.4/C, arrival entry at Ex.4/D and chemical examiner report at Ex.4/E, PW-2 PC Pir Bux at Ex.5. Thereafter, learned D.D.P.P. submitted application before the trial court for amendment of the charge. Application was allowed and the amended charge was framed at Ex.8 u/s 9(c) of CNS Act, 1997. To which accused pleaded not guilty and claimed to be tried. Thereafter, learned advocate for accused adopted the same cross examination and the trial court recorded the statement of accused u/s 342 Cr.P.C.at Ex.11, in which accused has claimed false implication in this case and denied the prosecution allegations. Accused had raised plea that PWs are police officials and interested. In a question what else he has to say, accused has stated that he is Barber and the police personnel used to visit his shop for hair cutting and since he demanded the charges, he was involved in this case falsely. Accused neither examined himself on Oath in disproof of prosecution allegations nor led any evidence in his defence.

6. Learned trial court after hearing the learned counsel for the parties and assessment of the evidence available on record convicted and sentenced the appellant as stated above. Hence this appeal.

7. The facts of this case and the evidence have already been discussed by the trial court in its judgment. Therefore, there is no need to repeat it.

8. Syed Babar Ali Kazmi, learned advocate for appellant has mainly contended that after amendment of the charge prosecution failed to produce the witnesses for their evidence and the trial court adopted the illegal procedure. He has further contended that the charas was recovered from the

possession of accused on 26.01.2012 and it was sent to the chemical examiner on 28.01.2012. The safe custody in the aforesaid period has not been established. It is also contended that neither WHC of the police station nor the Constable who had taken sample to the chemical examiner have been produced before the trial court for their evidence. It is contended that there was no evidence that how many grams were taken from the each rod for sending to the chemical examiner. Lastly, it is submitted that there was overwriting in the roznamcha entry. In support of his contentions, learned counsel has placed reliance on the case of *TARIQ PERVEZ V/S. THE STATE (1995 SCMR 1345)*, and *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)*.

9. Syed Meeral Shah, Additional Prosecutor General, appearing for the State conceded to the arguments raised by learned counsel for the appellant and recorded no objection. He did not support the judgment of the trial court.

10. 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.

11. In our considered view the prosecution has failed to prove its case against the appellant for the reasons that according to the case of prosecution charas was recovered from the possession of accused on 26.01.2012 on spy information and it was sent to the chemical examiner on 28.01.2012. It is the contention of the defence counsel that the prosecution failed to establish the safe custody of the charas at Malkhana for two days. Safe transit to the chemical examiner has also not been proved. HC Shahid who had taken the sample to the chemical examiner has not been produced before the trial court for recording the evidence. It was the case of the spy information and the SHO had sufficient time to call the private persons but no effort whatsoever

were made by him to call the independent persons of the locality. There was nothing on the record that how much grams were taken / drawn from the each rod recovered from the accused for sending the same to the chemical examiner for analysis. Accused has raised plea that he was Barber and the police officials used to visit his shop and when he demanded the charges of hair cutting he was involved in this case falsely. In such circumstances, we are unable to rely upon the evidence of the police officials without any independent corroboration which is lacking in this case. We have also noticed that the charge was framed against the accuse u/s 9 (b) of CNS Act, 1997 and on the conclusion of the evidence the charge was amended to Section 9 (c) of CNS Act, 1997. Thereafter, the learned advocate for accused filed the statement for adopting the same evidence. It was very strange that the trial court without application of mind adopted the illegal procedure. The prosecution witnesses were not examined / cross examined in accordance with law. Moreover, there was delay of two days in sending the sample to the chemical examiner. WHC of the police station with whom the case property was deposited in Malkhana has not been examined so also the PC who had taken the sample to the chemical examiner to satisfy the court that the charas was in safe custody. In this regard reliance is 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. In our considered view, 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. There are also several circumstances which create 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.”

13. While relying upon the aforesaid authorities and keeping in view no objection raised by the learned A.P.G. we have no hesitation to hold that the prosecution has failed to prove its case against the accused. 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. These are the reasons of our short order dated 16.05.2017.

JUDGE

JUDGE

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