

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Appeal No.D-21 of 2013

PRESENT

*Mr. Justice Naimatullah Phulpoto
Mr. Justice Zulfiqar Ahmad Khan.*

Date of Hearing: 22.05.2017

Date of Judgment: 22.05.2017

*Appellant/accused: Nazeer Ahmed Brohi S/o Muhammad
Yaqoob: Through Mr.Muhammad
Sharif Siyal, Advocate.*

*The State: Through Syed Meeral Shah Bukhari,
Additional Prosecutor General, Sindh.*

JUDGMENT

NAIMATULLAH PHULPOTO, J:- Appellant / accused

Nazeer Ahmed Brohi alongwith co-accused *Nooro, Lutuf and Imam Bux* (since acquitted) were tried by learned Special Judge (NARCOTICS)/Sessions Judge, Shaheed Benazirabad, in Special Narcotic Case No.275 of 2008 arising out of Crime No.115 of 2008 for offence under Section 9(c) Control of Narcotic Substances Act, 1997. By judgment dated 28.03.2013, the appellant was convicted under Section 9(c) Control of Narcotic Substances Act, 1997 and sentenced to 05 years and 06 months R.I and to pay a fine of Rs.25,000/-, in case of default in payment of fine, he was ordered to suffer S.I for 05 months and 15 days more. Benefit of Section 382(B) Cr.P.C was extended to the appellant. Co-accused *Nooro, Lutuf and Imam Bux* were acquitted by the Trial Court under Section 265(K) Cr.P.C vide order dated 03.11.2012.

2. Brief facts of the prosecution case are that SHO Inayatullah Jamali was present at Police Station on 24.08.2008 at 1730 hours. SHO received spy information that present accused, who was absconder in a case registered at P.S B-Section, Nawabshah was present alongwith other accomplices in his Otaq and was selling charas openly. On such information, it is alleged that the police party proceeded to the pointed place in a Government vehicle vide roznamcha entry No.16 at 1740 hours. At about 1800 hours, the police party reached at the pointed place and saw the present appellant/accused Nazeer Ahmed Brohi standing in his Otaq alongwith co-accused Imam Bux, Nooro Brohi and Lutuf Makrani, armed with pistols, who while seeing the police party, it is alleged that accused fired upon the police party with intention to kill and the police also fired upon the accused in self defence. SHO Inayatullah conveyed the information of the encounter to the high-ups on wireless. It is alleged that S.P.O Town namely Muhammad Aslam Langah, SHOs P.S A-Section, Nawabshah alongwith Incharge CIA Noor Muhammad Mari and their subordinate staff arrived at the place of incident and participated in the encounter. There was exchange of fires for about 20 minutes. Thereafter, it is alleged that the police officials succeeded to catch hold the present appellant, while rest of the accomplices made their escape good by taking advantage of narrow streets. From the possession of the accused, it is alleged

that a pistol was recovered. On inquiry, the present accused disclosed his name as Nazeer Brohi. SHO Inayatullah tried to call the private persons but he could not succeed. Thereafter, he made SIPs Noor Ahmed Mari and Ghulam Sarwar Zardari as mashirs and conducted personal search of the accused. During his search, it is alleged that 05 small and 01 big pieces of charas were recovered from his possession, so also cash of Rs.600/-. Pistol recovered from the accused was made-in-Pakistan, containing seven live bullets, it was without license. Thereafter, it is stated that search of the Otaq was conducted and 02 iron drums and 02 plastic drums were found, which were used for preparation of desi wine. Charas recovered from the possession of the accused was weighed; it was 3000 grams, out of it, it is stated that 50 grams were separated from each piece of charas and sealed separately as a sample for sending to the chemical examiner for analysis. Samples were also taken from desi wine recovered from the Otaq for sending to the chemical examiner. Accused was inquired about the license of pistol recovered from him, he replied that it was without license. Thereafter, the accused and case property were brought to Police Station B-Section, Nawabshah, where, separate FIR was lodged against the accused on behalf of the State; it was recorded vide Crime No.115 of 2008 for offence under Section 9(c) Control of Narcotic Substances Act, 1997.

3. During the investigation, samples of the recovered substance were sent to the chemical examiner. Positive chemical

report was received. On the conclusion of the investigation, separate challan under Section 9(c) Control of Narcotic Substances Act, 1997 was submitted against the accused before the concerned Court.

4. Trial Court framed the charge against accused Nazeer Ahmed Brohi, Nooro, Lutuf and Imam Bux, under Section 9(c) Control of Narcotic Substances Act, 1997 at Ex-03. Accused pleaded not guilty and claimed to be tried. During pendency of the trial, accused Nooro, Lutuf and Imam Bux were acquitted of the charge under Section 265(K) Cr.P.C vide order dated 03.11.2012.

5. During trial, the prosecution examined P.W-1 SIP Inayatullah Jamali at Ex-14, who produced copy of FIR, mashirnama of arrest and recovery, copy of departure entry at Ex-14/A to 14/C. P.W-2 SIP Ghulam Sarwar Zardari was examined at Ex-16 and P.W-3 SIP Inam Illahi Awan at Ex-17, who produced positive chemical examiner's report at Ex-17/A. Thereafter, the prosecution side was closed.

6. Statement of accused Nazeer Ahmed Brohi was recorded under Section 342 Cr.P.C at Ex-19. Accused claimed his false implication in this case and denied the prosecution allegations and stated that report of the chemical examiner has been managed. Accused has raised plea that P.Ws have deposed against him due to political rivalry. He further stated that he was Councilor, so also his daughter. They did not caste the votes in favour of their opponents, as such was involved in this case falsely.

Accused has examined himself on oath. However, he did not lead defence evidence.

7. Trial Court after hearing the learned Counsel for the parties and assessment of the evidence by judgment dated 28.03.2013, convicted the appellant under Section 9(c) Control of Narcotic Substances Act, 1997 and sentenced as stated above, hence, this appeal.

8. The evidence produced before the Trial Court find an elaborate mention in the judgment passed by the Trial Court dated 28.03.2013, therefore, the same may not be reproduced here, in order to avoid duplication and un-necessary repetition.

9. Mr. Muhammad Sharif Siyal, Advocate for the appellant has mainly contended that the first episode of the incident was police encounter, in which none received any injury from either side. It is argued that the alleged charas has been foisted upon the appellant for the political reasons. Counsel for the appellant argued that there was inordinate delay in sending sample of charas to the chemical examiner. It is also contended that safe custody of charas allegedly recovered from the appellant has not been established. Counsel for the appellant further submitted that co-accused on the same set of evidence have already been acquitted under Section 265(K) Cr.P.C and the appellant has also been acquitted under Section 249-A Cr.P.C by the learned IInd Judicial Magistrate, Nawabshah in an offence under Article 3/4 Prohibition (Enforcement of Hadd) Ordinance, 1979 on the basis of same

material. Counsel for the appellant in support of his contentions has relied upon the cases of *MUNAWAR ALI JATOI V/S. THE STATE (2012 MLD 1763)*, *IMRAN V/S. THE STATE (2013 P.Cr.L.J 640)*, *TARIQ PERVEZ V/S. THE STATE (1995 SCMR 1345)*, *JAVED AKHTAR V/S. THE STATE (1998 P.Cr.L.J 1462)*, *IRFAN ALI BHAYO V/S. THE STATE (2008 YLR 37)*, *NABEELA BIBI V/S. THE STATE (2005 P.Cr.L.J 1472)*, *INAMULLAH KHAN V/S. THE STATE (2008 MLD 1565)*, *GHOUS BAKHSH ALIAS GHOUSA V/S. THE STATE (2000 MLD 618)*, *TAJ AKBAR V/S. THE STATE (2011 P.Cr.L.J 90)* and *IKRAMULLAH AND OTHERS V/S. THE STATE (2015 SCMR 1002)*.

10. Syed Meeral Shah Bukhari, learned Additional Prosecutor General conceded to the contentions raised by learned Counsel for the appellant and argued that according to the case of the prosecution, charas was recovered from the possession of the appellant on 24.08.2008 but its sample was sent to the chemical examiner on 09.09.2008 and there was no evidence that charas was deposited in safe custody during that period. Learned Additional Prosecutor General further argued that W.H.C of Police Station, with whom the charas was kept in *Malkhana* has also not been examined by the prosecution, so also P.C Lutuf Ali, who had taken charas to the chemical examiner. Learned A.P.G did not support the judgment of the Trial Court.

11. We have carefully heard learned Counsel for the parties and perused the evidence minutely. In our considered view,

the prosecution has failed to prove its case against appellant Nazeer Ahmed Brohi for the reasons that it was the case of the spy information. SHO Inayatullah had sufficient time to associate with him the independent persons of the locality to witness the recovery proceedings but he failed to do so. According to the case of the prosecution, there was exchange of fires with the sophisticated weapons but not a single injury was caused to either party. Prosecution witnesses have deposed that 3000 grams of charas were recovered from the possession of the accused on 24.08.2008 but the sample of charas was sent to the chemical examiner on 09.09.2008, delay in sending sample of charas to the chemical examiner has not been explained. Plea is raised by the appellant that he was Councilor, so also his daughter and they did not cast vote in favour of their opponents and the Police has lodged case against him at the instance of his political opponents. In these circumstances, we are unable to rely upon the evidence of the police officials without independent corroboration, which is lacking in this case. There is also another aspect in this case, co-accused without recording evidence have been acquitted by the Trial Court under Section 265(K) Cr.P.C by disbelieving prosecution version. Appellant has also been acquitted under Section 249(A) Cr.P.C by the IInd Judicial Magistrate, Nawabshah in a case registered against the appellant under Article 3/4 Prohibition (Enforcement of Hadd) Ordinance, 1979. Present case is also based on same set of evidence. Learned A.P.G rightly conceded that safe custody of charas at the *Malkhana* and its transit to the chemical examiner

have not been established. We are also of the considered view that safe custody of charas and its transit to the chemical examiner have not been proved by cogent and confidence inspiring evidence. Learned Counsel for the appellant has rightly relied upon the case of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)*, wherein, the Honourable Supreme Court has held as under:-

“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 have created reasonable doubt in the prosecution case. We, therefore, extend benefit of doubt to the appellant. Appeal is allowed. Conviction and sentence recorded by the Trial Court vide judgment dated 28.03.2013 are *set aside*. Appellant is acquitted. Appellant is present on bail, his bail bond stands cancelled and surety is hereby discharged.

JUDGE

JUDGE

Shahid