

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Appeal No.D-78 of 2013

PRESENT

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

Date of Hearing: 26.04.2017

Date of Judgment: 26.04.2017

*Appellant/accused: Fayyaz S/o Muhammad Aslam
Mughal: Through Syed Babar Ali
Kazmi, Advocate*

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

JUDGMENT

NAIMATULLAH PHULPOTO, J:- This Criminal Appeal has called in question the judgment dated 03.10.2013 passed by learned 1st Additional Sessions Judge/Special Court (CNS), Hyderabad in Special Case No.73 of 2010 arising out of Crime No.176 of 2010 registered at P.S Husri for offence under Section 9(b) Control of Narcotic Substances Act, 1997, whereby the learned Judge convicted the appellant for offence under Section 9(b) Control of Narcotic Substances Act, 1997 and sentenced to imprisonment for 03 years and to pay a fine of Rs.20,000/-, in default whereof, to suffer R.I for 02 months more. Appellant was extended benefit of Section 382(B) Cr.P.C.

2. Brief facts of the prosecution case as unfolded in the FIR lodged by complainant ASI Mohammad Ishaque Sangrasi are that he was posted as Incharge at P.P Seri. On 23.07.2010 he

alongwith PCs Dildar Hussain and Ghanwar Khan vide roznamcha entry No.5 at 1630 hours left police post in a private vehicle for patrolling. While patrolling at various places, when the police party reached at Pinyari Wah, Saeedpur Road leading to Takro near Qainchi Mori at 1730 hours, it is alleged that present accused was seen by the police party; he was standing and waiting for the conveyance; police officials suspected him and stopped the vehicle. On seeing the police party the person tried to run away but he was surrounded and caught-hold. On inquiry, he disclosed his name as Fayyaz S/o Muhammad Aslam by caste Mughal. Finding suspicious his personal search was conducted by ASI Mohammad Ishaque Sangrasi in presence of P.Cs/mashirs. During personal search, from the fold of his shalwar, a plastic bag was recovered on which words "A Jameela 333" were written. Plastic bag was opened; it contained a piece of charas; it was weighed and the weight of the charas became 460 grams, out of it, 10 grams were separated as a sample for sending to the chemical examiner for analysis. Cash of Rs.250/- was also recovered; case property and remaining charas were separately sealed. Mashirnama of arrest and recovery was prepared. ASI Mohammad Ishaque has mentioned that due to non-availability of the private persons at the time of recovery, he had made PCs Dildar Hussain and Ghanwar Khan as mashirs. Accused further disclosed before the police that he had purchased charas from one Ghulam Nabi Memon from Saeedpur Takkar. Thereafter, the accused and case property were brought to the police station, where, FIR was lodged against the

accused on behalf of the State; it was recorded vide Crime No.176 of 2010 for offence under Section (b) Control of Narcotic Substances Act, 1997.

3. During the investigation, 161 Cr.P.C statements of P.Ws were recorded. Sample was sent to the Chemical Examiner for analysis. On finalization of the investigation, challan was submitted against the accused under Section 9(b) Control of Narcotic Substances Act, 1997.

4. Trial Court framed the charge against the accused under Section 9(b) Control of Narcotic Substances Act, 1997 at Ex-2. Accused pleaded not guilty and claimed to be tried.

5. Prosecution, in order to substantiate the charge, examined P.W-1 SIP Moula Bux at Ex-5, who produced memo of place of incident, arrival and departure entries and chemical examiner's report at Ex-5/A to 5/C. P.W-2 Deedar Hussain was examined at Ex-6, who produced memo of arrest and recovery at Ex-6/A and P.W-3 SIP Mohammad Ishaque at Ex-7, who produced FIR, arrival and departure entries at Ex-7/A to 7/C. Thereafter, learned DDPP closed the side vide his statement at Ex-8.

6. Statement of accused was recorded under Section 342 Cr.P.C at Ex-9, in which the accused denied the allegations of the prosecution and claimed innocence. Plea has been raised by the accused that he has been involved in this case at the hands of his enemies and he examined D.W Muhammad Younis. Accused

declined to be examined on oath in disproof of the prosecution allegations.

7. Learned Trial Court after hearing the learned Counsel for the parties and assessment of the evidence came on record, convicted the appellant under Section 9(b) Control of Narcotic Substances Act, 1997 and sentenced as stated here-in-above.

8. Trial Court in the Judgment dated 03.10.2013 has already discussed the evidence in detail and there is no need to repeat the same, so as to avoid duplication and un-necessary repetition.

9. Syed Babar Ali Kazmi, learned Advocate for the appellant mainly contended that it was the day time and the accused was arrested from very busy road but no private person was made as mashir to witness the recovery proceedings. It is further contended that according to the case of the prosecution, the charas was recovered from the possession of the appellant on 23.07.2010 but sample of it was sent to the chemical examiner on 30.07.2010 by HC Muhammad Hashim and the delay in sending of the sample has not been plausibly explained by the prosecution. It is also contended that neither WHC of the police station nor PC Muhammad Hashim, who had taken sample of charas to the chemical examiner, have been examined by the prosecution to prove that charas was in safe custody. Learned Advocate for the appellant has pointed out that there is overwriting in the roznamcha entry No.5, for which the prosecution has failed to furnish any

explanation. Lastly, it is contended that the appellant has raised plea before the Trial Court that he was carpenter and SHO Mohammad Ishaque had got furniture of his office made from him but when he demanded money, he was involved in this case falsely. Learned Counsel for the appellant, in support of his contentions, has relied upon the cases of *ANF THROUGH DEPUTY DIRECTOR LAW V/S. ALLAH BUX & ANOTHER (2012 YLR 503)*, *INZAR V/S. THE STATE (2013 P.Cr.L.J 843)* and *RIAZ AHMED V/S. THE STATE (2015 P.Cr.L.J 143)*.

10. Syed Meeral Shah Bukhari, learned D.P.G conceded to the contentions raised by learned Counsel for the appellant that there was no evidence that the charas was in safe custody for the period in between 23.07.2010 to 30.07.2010 and HC Muhammad Hashim, who had taken sample of charas to the chemical examiner, has not been examined by the prosecution.

11. After hearing leaned Counsel for the parties, we have carefully examined the evidence available on record. From the perusal of the evidence, it transpires that P.W-03 ASI Mohammad Ishaque was Incharge at P.P Seri P.S Husri. On 23.07.2010, he left police post for patrolling alongwith PCs Dildar Hussain and Ghanwar Khan in a private vehicle. When the police party reached at Qainchi Mori, Saeedpur Road, the present accused was found suspicious and he was surrounded and caught-hold. SIP Mohammad Ishaque conducted personal search of the accused in the presence of mashirs and recovered one plastic bag

from his possession containing 460 grams of charas. Cash of Rs.250 was also recovered; case property was sealed; mashirnama of arrest and recovery was prepared. Thereafter, the accused and case property were brought to the police station, where FIR was lodged against the accused bearing Crime No.176 of 2010. SIP Mohammad Ishaque in his cross-examination has replied that he had gone for patrolling in a private vehicle. We are unable to understand as to why a private vehicle was used by SIP Mohammad Ishaque. Normally the police party uses the police mobile during patrolling. It was day time when the accused was arrested from the road. Accused has raised defence plea that he had provided furniture to SIP Mohammad Ishaque and when he demanded money, he has been involved in this case falsely. Non-examination of the private persons of the locality would be fatal to the prosecution case. Moreover, it is a matter of the record that the accused was arrested on 23.07.2010 and the sample of charas was sent to the chemical examiner on 30.07.2010 and the delay in sending sample of the charas has not been explained by the prosecution, so as to satisfy the Court that sample was safely handed over in the office of chemical examiner. There is no evidence that the charas was in safe custody in *Malkhana*. HC Muhammad Hashim, who had taken charas to the chemical examiner has not been examined by the prosecution. On this aspect of the case, reliance is placed 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. Moreover, we have noticed with regard to overwriting in the mashirnama of arrest and recovery as well as roznamcha entry No.5 dated 23.07.2010 Ex-7/C, no plausible explanation has been furnished to that effect. Trial Court has not considered the defence evidence according to the settled principles of law. No doubt police officials are as good witnesses as that of other citizens. Control of Narcotic Substances Act, 1997 was enacted for awarding exemplary punishments to the persons involved in the narcotics in any manner and this Court is conscious of the fact that Control of Narcotic Substances is an exhaustive law to deal with drug peddlers where it even provides capital punishment and wherein even the procedural provisions are very stringent. While section 25 of Control of Narcotic Substances Act, 1997 ousts the applicability of Section 103 Cr.P.C but the prosecution is still duty bound to conduct honest investigation. If any flaw or weakness are spelled

out from the record and if there is reasonable doubt in the prosecution case, the benefit of it still resolves in favour of the accused. In the present case there are flaws and weaknesses as mentioned above. Prosecution was duty bound to prove its case beyond any reasonable shadow of doubt against the accused, multiple doubts are not required in the prosecution case for giving benefit of doubt to an accused, if there is single circumstance creating reasonable doubt in the prosecution case, is sufficient for acquittal of the accused as held in the Honourable Supreme Court of Pakistan in the case of *TARIQ PERVEZ V/S. THE STATE (1995 SCMR 1345)*.

13. For the foregoing reasons, we are of the considered view that the prosecution has failed to prove its case against the appellant beyond reasonable doubt. Resultantly, the present appeal is allowed, impugned judgment dated 03.10.2013 is *set aside* and the appellant is acquitted of the charge. Appellant is present on bail, his bail bond stands cancelled and surety is hereby discharged. These are the reasons for our short order dated 26.04.2017 pronounced in open Court.

JUDGE

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