

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Appeal No.D-177 of 2004

P R E S E N T

Mr. Justice Naimatullah Phulpoto

Mr. Justice Zulfiqar Ahmad Khan.

Date of Hearing: 24.04.2017

Date of Judgment: 24.04.2017

*Appellant/accused: Anwar Ali @ Anu S/o Qabool Mallah:
Through Syed Tarique Ahmed Shah,
Advocate*

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

J U D G M E N T

NAIMATULLAH PHULPOTO, J:- Present appeal is directed against the judgment dated 07.10.2004 passed by learned Special Judge (NARCOTICS)/Sessions Judge, Badin in Sessions Case No.119 of 2000 for offence under Section 9(b) Control of Narcotic Substances Act, 1997 and Article 3/4 Prohibition (Enforcement of Had) Order 1979, by which learned Judge convicted appellant Anwar Ali alias Anu for offence under Section 9(b) Control of Narcotic Substances Act, 1997 and sentenced to 03 years R.I and to pay a fine of Rs.10,000/-, in case of default in payment of fine, to suffer R.I for 06 months more. Benefit of Section 382(B) Cr.P.C was extended to the appellant.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 17.05.2000, SIP Ali Raza SHO P.S Badin left police station alongwith subordinate staff in a Government vehicle vide roznamcha entry No.22 for patrolling duty. While patrolling at various places, when the police party reached at Shahnawaz Chowk, SHO received spy information that accused Anwar Ali alias Anu Mallah and Ghulam Hussain Mallah were preparing country-made wine for selling purpose and they were selling charas and opium. On such prior information, the police party approached Mukhtiarkar and FCM Badin and joined Mr. Muhammad Chhuttan, Mukhtiarkar and FCM for conducting raid. It is alleged that SIP Muhammad Ramzan of CIA alongwith his staff had also accompanied the SHO. Thereafter, the police officials alongwith Mukhtiarkar and FCM proceeded to the house of accused Ghulam Hussain and Anwar Ali. It is alleged that appellant Anwar Ali was identified by the police party as he was serving as driver of Fire Brigade, Municipal Committee Badin. While seeing the police party, it is alleged that accused Anwar Ali alias Anu by throwing a tin of 2 and half K.G ran away. Tin was opened by the police party; it contained charas, weighing 400 grams and 150 grams opium; out of the charas and opium, 20 grams each were separated and sealed for sending to the Chemical Examiner for analysis. Police party raided the pointed house and found there three persons preparing country-made wine. Those persons were apprehended, on inquiry they disclosed their names as Ghulam Hussain Mallah, Peeru Pathan and Qadir Bux Khoso. Police secured one plastic

cane, half of which was filled with country-made wine and three tins of raw wine. It is alleged that mashirnama of arrest and recovery in presence of mashirs SIP Muhammad Ramzan Behrani of CIA and SIP Mumtaz Ali was prepared; it was attested by Mukhtiarkar and FCM Badin. Thereafter, the accused and case property were brought to the police station, where FIR was lodged against the accused on behalf of the State vide Crime No.97 of 2000 for offence under Section 9(b) Control of Narcotic Substances Act, 1997 and Article 3/4 Prohibition (Enforcement of Had) Order, 1979.

3. During the investigation, 161 Cr.P.C statements of P.Ws were recorded. Sample was sent to the Chemical Examiner for analysis. Accused Anwar Ali alias Anu was subsequently arrested. On the conclusion of the investigation, final report was submitted against the accused under Section 9(b) Control of Narcotic Substances Act, 1997 as well as Article 3/4 Prohibition (Enforcement of Had) Order, 1979.

4. Trial Court framed the charge against the accused under Section 9(b) Control of Narcotic Substances Act, 1997 and Article 3/4 Prohibition (Enforcement of Had) Order, 1979 at Ex-2. Accused pleaded not guilty and claimed to be tried.

5. At the trial, prosecution examined P.W-1 SIP Ali Raza at Ex-9, who produced mashirnama of arrest and recovery at Ex-10, F.I.R at Ex-11 and chemical examiner's report at Ex-12. P.W-2 mashir Muhammad Ramzan was examined at Ex-13. Thereafter, the prosecution gave up remaining P.Ws and closed its side.

6. During trial, accused Ghulam Hussain alias Ghulam expired away and the proceedings were abated against him vide order dated.15.12.2003.

7. Statements of accused Anwar Ali alias Anu, Peeru and Qadir Bux were recorded under Section 342 Cr.P.C at Ex-19 to 21, in which accused claimed false implication in this case. Accused Anwar Ali alias Anu in his statement recorded under Section 342 Cr.P.C raised plea that he has been falsely implicated in this case by the police officials as he was driver of the fire brigade vehicle of Municipal Committee Badin; many times SIP/I.O Ali Raza demanded water Tankers from him; on his refusal, he has been falsely implicated in this case. Accused did not examine himself on oath in disproof of the prosecution allegations. No evidence in defence was led by the accused.

8. Learned Trial Court after hearing the learned Counsel for the parties and assessment of evidence, found the case against co-accused Qadir Bux and Peeru as doubtful and acquitted them of the charge, while accused Anwar Ali alias Anu was convicted and sentenced as stated above.

9. The facts of this case as well as evidence produced before the Trial Court find the elaborate mention in the judgment passed by the Trial Court dated 07.10.2004, therefore, the same may not be reproduced here, so as to avoid duplication and unnecessary repetition.

10. Syed Tarique Ahmed Shah, learned Advocate for appellant has mainly contended that the prosecution case was highly doubtful, on the same set of evidence. Co-accused have been acquitted and the appellant has been convicted without assigning the sound reasons. It is also argued that no narcotic substances was recovered from the physical possession of the appellant at the time of the raid by the police officials. It is argued that it was quite unbelievable and un-natural that the appellant ran away from the police and CIA officials, though it was day time. It is also argued that the Investigating Officer has not been examined by the prosecution and non-examination of the Investigating Officer would be fatal to the prosecution case. It is also contended that there was delay of 16 days in sending the narcotic substances to the Chemical Examiner and such delay has not been plausibly explained by the prosecution. Learned Advocate for the appellant has argued that there are material contradictions in the evidence of the prosecution witnesses. Lastly, it is contended that the appellant has raised a specific plea that he was driver of the fire brigade and the Investigating Officer several times had asked him to supply water tankers but he refused and on such refusal, the appellant has been falsely involved in this case. In support of his contentions, learned Counsel for the appellant has relied upon the cases of *MUHAMMAD ASLAM V/S. THE STATE (2011 SCMR 820)*, *SHAFIULLAH V/S. THE STATE (2007 YLR 3087)* and *IRFAN ALI BHAYO V/S. THE STATE (2008 YLR 37)*.

11. Syed Meeral Shah Bukhari, learned D.P.G conceded to the contentions of the defence Counsel that on same set of evidence, co-accused have been acquitted by the Trial Court and the appeal against their acquittal has not been filed by the State. Learned D.P.G after perusal of the evidence has argued that there was delay of 16 days in sending the narcotic substances to the Chemical Examiner. He has also submitted that Investigating Officer has not been examined by the prosecution. Learned D.P.G, in view of above, did not support the impugned judgment passed by the Trial Court.

12. We have carefully heard learned Counsel for the parties and perused the evidence minutely.

13. From the perusal of evidence on record, it transpires that on the same set of evidence, co-accused Qadir Bux and Peeru have been acquitted by the Trial Court and prosecution evidence with regard to the appellant has not been properly appreciated by the trial Court according to the settled principles of law. It was unbelievable that appellant Anwar Ali alias Anu succeeded in running away from the police and CIA officials from the place of incident safely, though it was day time. Investigating Officer has also not been examined by the prosecution; non-examination of Investigating Officer would be beneficial circumstance for the appellant. It is matter of the record that no narcotic substance was recovered from the physical possession of the appellant but according to prosecution case, it was thrown by the appellant.

Mashirnama of arrest and recovery is contradictory to the evidence of the prosecution witnesses. According to the prosecution case, narcotic substance was recovered on 17.05.2000 but the sample was sent to the Chemical Examiner on 03.06.2000 with delay of 16 days and it has not been explained by the prosecution. It is matter of the record that only one piece was sent to the Chemical Examiner for analysis; it is also not clear that from which piece, narcotic substance was taken. On the point of delay in sending narcotic substances to the Chemical Examiner for a period of more than seven days, the Honourable Supreme Court in the case of *Muhammad Aslam V/s. The State (2011 SCMR 820)* has held that delay of more than seven days in sending the samples of narcotics to Chemical Examiner for analysis, which was not explained by the prosecution, would be doubtful. Relevant portion is reproduced as under:-

“5. Learned Counsel for the appellant, Mr. Muhammad Zaman Bhatti, after making detailed reference to the oral and documentary evidence brought on record by the prosecution, vehemently contended that conviction of the appellant for the commission of offence under section 9(c) of the Act, 1997, is result of gross misreading and non-reading of material pieces of evidence, from which it was established that he was an innocent person, who was falsely implicated in the crime by the police. In this regard, learned counsel has made reference to the deposition of Muhammad Anwar ASI, P.W-5, who, in his deposition, has stated that on the pointation of informer, he had seen the accused person standing at a distance of eight or ten yards towards western side of the road and had taken his personal search but nothing was recovered. However, as he was standing near ten sacks, therefore, it was presumed that he was the person carrying such sacks of narcotics. It is significant to note that as per prosecution’s own case, this incident had occurred in a busy area (public place) of town where number of

private persons were available, but no efforts were made by the Investigating Officer of the rime to arrange any witness of the locality, who might have seen the appellant in any manner linked with the ten sacks of narcotics lying near the road in open space. Learned Counsel, while making reference to the evidence of other prosecution witnesses, has shown that even in the evidence of two prosecution witnesses, who were allegedly eye-witnesses of the arrest of the appellant and recovery of narcotic substances from his possession in the form of ten sacks, they have nowhere stated that they had, in any manner, seen the appellant either bringing those sacks or carrying the same with him. Thus, mere fact that appellant was standing near those bags could not e a proof of the fact that he was the person in active possession of ten sacks containing narcotic substances. May be the same were belonging to some other criminal, who might have slipped away seeing the police raiding party as also specifically deposed by the appellant in his statement on oath under section 340(2) Cr.P.C before the trial Court. He also made reference to the report of Chemical Examiner to show that without any plausible explanation, the alleged samples of narcotic substances were sent to the Chemical Examiner after delay of eight days, though, as per Rule 4 of the Control of Narcotic Substance (Government Analysts) Rules, 2001, this exercise was required to be completed within seventy two hours of the recovery, and for this purpose, even there is no plausible explanation from the side of the prosecution that why such inordinate delay was caused in the completion of this exercise by the Investigating Officer.

6. In the light of submissions made by the learned counsel for the appellant, we have carefully gone through the case record as well as the two judgments impugned before us by the appellant and seen that the evidence adduced by the prosecution lacked quality as well as reliability about the involvement of the appellant in the commission of crime for many reasons. In the instant case, it seems to be highly improbable that the informer, after seeing the appellant, allegedly standing at Toll Tax with huge quantity of narcotics, will cover long distance to inform the police party, who will come back at the place of occurrence in his company and will catch hold of appellant, as if he was waiting for them at the place of occurrence; no evidence has come on record to show that either the informer or any person had seen the appellant either loading or unloading the said sacks containing narcotic substances from any

vehicle or other source, which, in other words, means that even if the said ten sacks were containing narcotic substances in the form, as reported by the Chemical Examiner, mere fact that the appellant was standing near those sacks or a passerby will not establish that the same were in his active possession or even he had any knowledge about the contents of those bags. It is well-settled legal principle regarding dispensation of justice in criminal cases that if any reasonable doubt is created in the case of the prosecution then its benefit is to be extended to the accused party. In the instant case, as discussed above, even if whole evidence of the prosecution is considered in its totality, it is not established beyond reasonable doubt that the alleged quantity of 9-1/2 mounds contained in ten sacks was owned by the appellant or it was in his possession. Another distinguishable feature of the case is that there is no explanation, whatsoever, from the side of the prosecution about the delay of over seven days in the remission of samples to the Chemical Examiner for his report.”

14. We have also noticed major contradictions in the evidence of the prosecution case on material particulars of the case, particularly the recovery proceedings. Accused Anwar Ali has raised a specific plea in his statement recorded under Section 342 Cr.P.C that he has been falsely involved in this case by the Investigating Officer as he was driver of the fire brigade and he had refused to supply water tankers to the Investigating Officer. In such circumstances, without independent corroboration, it would be unsafe to rely upon the evidence of the police officials but in this case independent corroboration is lacking. It is settled law that it is not necessary that there should be 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 as held by Honourable

Supreme Court in the case of *TARIQ PERVEZ V/S. THE STATE* (1995 SCMR 1345).

15. For the above stated reasons, we have come to the conclusion that the prosecution has failed to prove its case against the appellant beyond reasonable doubt. Resultantly, by extending benefit of doubt, appeal is allowed, the impugned judgment dated 07.10.2004 is *set-aside* and the appellant is acquitted of the charge. Appellant Anwar Ali alias Anu is present on bail, his bail bond stands cancelled and surety is hereby discharged.

JUDGE

JUDGE

Shahid