

JUDGMENT SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD
Cr. Appeal No.D-178 of 2005

PRESENT

Mr. Justice Naimatullah Phulpoto

Mr. Justice Rasheed Ahmed Soomro

Date of Hearing: 24.03.2017

Date of Judgment: 24.03.2017

Appellant/accused: Through Mr. Aijaz Shaikh, Advocate

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

JUDGMENT

NAIMATULLAH PHULPOTO, J:- Appellant Mumtaz Ali faced trial before the learned Special Judge (NARCOTICS), Dadu in Special Case No.91/2004 for offence under Section 9(b) of Control of Narcotic Substances Act, 1997. Trial Court vide judgment dated 14.12.2005 convicted the appellant under Section 9(b) of Control of Narcotic Substances Act, 1997 and sentenced to suffer 15 months R.I and to pay a fine of Rs.15,000/-, in case of default in payment of fine the appellant was ordered to suffer R.I for 03 months more. However, appellant was extended benefit of Section 382(B) Cr.P.C.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 21.03.2004 at 1230 hours ASI Muhammad Ismail Samejo of Police Station, Dadu left the police station alongwith his subordinate staff namely P.Cs Muhammad Sulleman, Ghulam

Mustafa and Abdul Aziz vide roznamcha entry No.11 for patrolling by foot and during patrolling they received spy information that some persons were selling charas at Railway Track near Mohsin Shah Graveyard. On receipt of such information, police party proceeded there and saw that six persons were present at Mohsin Shah Graveyard, out of them, one person was carrying a plastic shopper in his hand, who while seeing the police party tried to run away but he was surrounded by the police and caught-hold. One accused person made escape good. Police officials identified him as Ashiq Chandio. On inquiry, present appellant/accused disclosed his name as Mumtaz Ali S/o Laiq Mallah. ASI conducted personal search of accused Mumtaz Ali in presence of mashirs, plastic bag was recovered from his possession, it was opened, there were 10 pieces of charas in it, charas was weighed, it was 115 grams. Cash of Rs.40/- was also recovered, second accused disclosed his name as Manzoor Jatoi, third accused disclosed his name as Ghulamullah alias Habibullah, fourth accused disclosed his name as Niaz Mallah and the fifth as Zahid Hussain Mallah. During their personal search, it is alleged that ASI secured 100 grams of charas from accused Manzoor Jatoi, 110 grams of charas from accused Ghulamullah alias Habibullah, 50 grams of charas from accused Niaz Mallah and 40 grams of charas from accused Zahid Hussain Mallah. ASI separated 10 grams from each piece of charas as samples for sending to the chemical examiner for analysis. Samples as well as remaining charas were separately sealed. Mashirnama of arrest

and recovery was prepared. Accused and case property were brought to the police station, where FIR was lodged against present accused, it was recorded as Crime No.39/2004 for the offence under Section 9(b) CNS Act, 1997.

3. During the investigation, samples were sent to the chemical examiner. Positive report was received. On the completion of usual investigation, challan was submitted against the accused under Section 9(b) Control of Narcotic Substances Act, 1997.

4. Trial Court issued N.B.Ws against absconding accused Ashiq Chandio but the same were returned un-executed. Finally, accused Ashiq Chandio was declared as proclaimed offender.

5. Trial Court framed the charge against accused Mumtaz Ali at Ex-2. Accused pleaded not guilty and claimed to be tried.

6. In order to prove its case, the prosecution examined P.W-1 LNK Ghulam Mustafa at Ex-6, who produced memo of arrest and recovery at Ex-6/A, FIR at Ex-6/B. P.W-2 ASI Muhammad Ismail Samejo at Ex-7, who produced attested copy of roznamcha entries at Ex-7/A and report of chemical examiner at Ex-7/B. Thereafter, prosecution side was closed.

6. Statement of accused was recorded under Section 342 Cr.P.C at Ex-9, in which accused claimed his false implication in this case and denied the prosecution allegations. Accused neither examined himself on oath nor led any evidence in his defence.

Trial Court after hearing the learned Counsel for the parties and appreciating the evidence convicted the appellant under Section 9(b) of CNS Act, 1997 and sentenced as stated above. Hence, the appellant has filed the instant appeal.

7. Mr. Aijaz Shaikh, learned Advocate for appellant mainly contended that it was the case of spy information but the police officials failed to associate private persons for making them as mashir in this case. It is also argued that it was unbelievable the one accused Ashiq Chandio succeeded in running away from the Police party, who had official arms and ammunitions. It is further contended that there are material contradictions in the prosecution evidence and there was delay in sending the charas to the chemical examiner, which has not been plausibly explained, therefore, the prosecution case was highly doubtful.

8. Syed Meeral Shah Bukhari, learned D.P.G conceded to the contentions raised by learned Advocate for the appellant and did not support the impugned judgment.

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 14.12.2005, therefore, the same may not be reproduced here, so as to avoid duplication and unnecessary repetition.

10. After hearing the learned Counsel for the parties, we have scanned the entire evidence. From the perusal of the

evidence, it transpires that ASI Muhammad Ismail Samejo of P.S Dadu had left police station alongwith his subordinate staff for patrolling and he received spy information that some persons were selling charas at Railway Track near Mohsin Shah Graveyard. In spite of prior information no efforts were made by ASI Muhammad Ismail to call private persons of the locality to witness the recovery proceedings. It was doubtful that accused Ashiq Chandio ran away from the police party who were equipped with sophisticated weapons. There are material contradictions in the evidence of the prosecution witnesses with regard to the route of patrolling. According to the prosecution story charas was recovered from the possession of the accused on 18.06.2005 but it was sent to the chemical examiner on 27.07.2005. There was inordinate delay in sending the sample of charas to the chemical examiner for which no plausible explanation has been furnished. Learned Advocate for the appellant has argued that there was nothing on the record that charas was in safe custody during that period. Rightly reliance has been placed upon the case reported as 2008 Cr.L.J 26 (*Muhammad Abbas v. The State*). Relevant portion is reproduced as under:-

“After hearing the learned counsel for the parties and going through the record we have straightaway observed that although the alleged recovery of narcotic substance from the appellant’s possession had been effected on 29.6.1998 yet none of the prosecution witnesses had uttered even a single word as to what had happened to the recovered substance after its recovery and with whom the same had been deposited for safe custody. It was only Muhammad Ramzan, FC (PW4) who had stated before the learned Trial Court that on 13.7.1998 he had been handed over two

parcels said to contain heroin and Charas by Moharir Head Constable of the relevant Police Station for onward transmission to the office of the Chemical Examiner which he delivered there on the same day. The report of the Chemical Examiner (Exhibit-PE), however, shows that the docket of the samples of the recovered substance had been prepared on 6.7.1998 and the said samples had been dispatched by the Excise & Taxation Officer, Sheikhpura and not by the local police. We have required the learned counsel for the State to explain as to who the samples of the recovered substance had come in the hands of the Excise & Taxation Officer, Sheikhpura and what was the evidence available on the record to confirm that the same had been kept in safe custody while in possession of the Excise & Taxation Officer, Sheikhpura but after going through the record of the case from cover to cover he has categorically conceded that there is no evidence whatsoever available on the record in those respects. In such a state of the evidence available on the record safe custody of the recovered substance or its samples is not discernable from the record of this case and, thus, we have found it to be extremely unsafe to uphold and maintain the appellant's convictions and sentences recorded by the learned Trial Court. This appeal is, therefore, allowed, the convictions and sentences of the appellant recorded by the learned Trial Court are set aside and he is acquitted of the charge by extending the benefit of doubt to him. He shall be released from the jail forthwith if not required in any other case."

11. No doubt, evidence of the police officials cannot be discarded on the ground that they are police officials but in this case accused has raised plea of his false implication in this case. It has also been alleged by the accused that report of the chemical examiner has been managed. There are several circumstances in this case which create doubt in the prosecution case. It is settled law that one circumstance, which creates doubt in the prosecution case, is sufficient for extending benefit of doubt to the accused as held in the case of Abdul Wahid V/s. The State (2012 YLR 374), relevant portion is reproduced as under:-

“It is settled law that for giving benefit of doubt it is not necessary that there should be many circumstances creating doubts. If a circumstance, which would create reasonable doubt in a prudent mind about the guilt of accused, accused would be entitled to benefit thereof not as a matter of grace and concession not as of right.”

12. Reliance is also placed upon the case reported as *PLD 2008 S.C 349*, which reads as under:-

“For all what has been stated above, we are of the considered opinion that presence of the P.Ws at the time of occurrence was not free from doubt. It is cardinal principle of criminal jurisprudence that any genuine doubt arising out of the circumstances of the case should be extended to the accused as of right and not as concession. Hence, we allow this appeal and set aside the judgments passed by the learned courts below. The appellant is acquitted of the all the charges and would be released forthwith if not required in any other criminal case.”

13. No doubt, the evidence of the police officials is as good as of other private persons but in view of the defects in the prosecution case and plea of the accused of the false implication, it would be unsafe to rely upon such type of evidence without independent corroboration. It has been ruled by the Honourable Supreme Court in the case of *Muhammad Hashim v. The State (PLD 2004 SC 856)* that under the Control of Narcotic Substances Act, 1997 stringent sentences have been provided if offence charged under Section 9 of the Act is proved. Therefore, the provisions of the said Act have to be construed very strictly. It is high time for the Courts to ensure that the proceedings of recovery and seizure are made in the most transparent and confidence inspiring manner so as to protect the innocent citizens from the highhandedness of the law-enforcers, and to save them from the

agony of uncalled for trials and tribulations. In the circumstances, recovery made by police officials in the dubious manner have to be looked by the Courts with a critical eye and are to be scrutinized with due care and caution. In this case, the accused has raised a specific plea that he has been involved falsely by the police party as he had refused to give milk to the police party free of cost. In the view of defects, the case of the prosecution it is highly doubtful. Conviction cannot be based on such type of evidence. In the case of *Khalil Ahmed V/s. The State (PLD 2008 Karachi 8)*, this Court has held as follows:-

“18. In the circumstances, the case of the prosecution is highly doubtful. The conviction cannot be based on such type of trials which are marred by glaring infirmities. However, the trial Court resolved all the doubts in favour of prosecution and convicted the appellant, while losing sight of well-entrenched principle of law, that the burden was always on the prosecution to prove the charge beyond all reasonable doubts. The rule adopted by the trial Court, to say the least was not conducive for the safe administration of justice.

19. So far as the order of confiscation of the vehicle is concerned, it was made without availability of any material on the record. It was mechanically passed in flagrant violation of the provisions of section 33 of the Control of Narcotic Substances Act, as such the mandate of law was flouted by the trial Court. Thus the order of confiscation is nullity, the same deserves to be struck down.”

14. The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not

necessary that there should be many circumstances creating doubts. If there is a 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)*.

12. For what has been discussed above, we have come to the conclusion that prosecution case is highly doubtful and thus prosecution has failed to prove its case against the appellant beyond shadow of doubt. This appeal is, therefore, allowed. Conviction and sentence recorded by the Trial Court vide judgment dated 14.12.2005 are set aside. Appellant is acquitted of the charge by extending benefit of doubt to him. He is present on bail, his bail bond stands cancelled and surety is discharged. These are the reasons for our short order dated 24.03.2017 announced in open Court.

JUDGE

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