

**IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR**

Crl. Appeal No. D-159 of 2009  
Crl. Appeal No. D-160 of 2009

Present:

**Mr. Justice Naimatullah Phulpoto &  
Mr. Justice Rasheed Ahmed Soomro.**

Mr. Abdul Baqi Jan Kakar Advocate for appellant in both appeals.  
Mr. Saleem Akhtar, Additional Prosecutor General for the State.

Date of hearing: 06-07-2017

Date of Judgment: 06-07-2017

**J U D G M E N T**

**NAIMATULLAH PHULPOTO J.**, Appellant Ajab Ali alias Qadirdad was tried by learned Special Judge, CNS, Khairpur in special case No. 155 of 2004 for offence under section 9-C of CNS Act, 1997 and by judgment dated 10.10.2009 appellant was convicted under section 9-C of CNS Act, 1997 and sentenced to suffer R.I for five years and to pay fine of Rs. 10,000/- and in case of default to suffer S.I for two months more.

2. Appellant was also tried by learned Special Judge for STA in special case No. 57 of 2005 for offence under section 13(d) A.O and by judgment dated 10.10.2009 he was convicted and sentenced to five years R.I.

3. Brief facts leading to filing of these appeals are that on 18.4.2004 SIP/SHO Saifullah of P.S.Ranipur received spy information that present appellant Ajab Ali alias Qadirdad was selling narcotics at his house. On receiving such information, SHO alongwith his subordinate staff namely HCs Nadir Ali, Muhammad Sharif, PC Bakhsh Ali Shahani and others left P.S in Government vehicle vide roznamcha entry No.8 and proceeded to village Wario Wahan and reached at the house of accused. Police party entered into house of accused and saw present accused, sitting on a cot and two pieces of charas were lying at his cot so also one K.K. SHO took two pieces of charas from cot as well as K.K and live bullets. Accused failed to produce permit/license of KK recovered from his

possession. Charas was weighed in presence of mashirs H.C Nadir Ali and H.C Muhammad Boota, it was 1050 grams, in the shape of two slabs. 10 grams of charas were separated from each piece, total 20 grams of charas for sending to the chemical examiner for chemical analysis. Accused was arrested and joint mashirnama of arrest and recovery was prepared. Thereafter, accused and case property were brought to the P.S where two separate FIRs were lodged against accused on behalf of the state, one FIR bearing crime No. 44 of 2004 under section 13(d) A.O and another FIR bearing crime No.43 of 2004 under section 9-C of CNS Act, 1997.

4. After registration of FIR, same SHO started investigation, he recorded 161 CrPC statements of PWs and dispatched charas to the chemical examiner on 28.4.2004 through PC Wahid Ali and received positive report. On the conclusion of investigation, challan was submitted under section 13(d)A.O before learned Judge for STA, Khairpur. Case under section 9-C of CNS Act, 1997 against accused was challaned before learned Sessions Judge/Special court for CNS, Khairpur. Both cases were separately tried. Charge in 13(d) A.O was framed against accused at Exh.2, to which accused pleaded not guilty and claimed to be tried. Amended charge was framed against accused by learned Sessions Judge, Khairpur on 10.2.2005, to which accused pleaded not guilty and claimed to be tried. At the trial prosecution examined PW-1 ASI Nadir Ai at Exh.5, he produced Photostat copy of mashirnama of arrest and recovery of K.K and narcotics at Exh.5/A, PW-2 SHO Saifullah at Exh.6, he produced FIR No.44/2004 under section 13(d)A.O at Exh.6/A. Thereafter, DPP closed prosecution side vide his statement at Exh.7.

5. Statement of accused was recorded under section 342 CrPC at Exh.8 in 13(d) A.O case, in which accused claimed false implication in this case and denied recovery of unlicensed K.K form his house, however plea has been raised in this case that he has falsely been involved in this case at the instance of H.C

Gulsher. Accused did not lead evidence in defence and declined to give statement on oath in disproof of prosecution allegation.

6. Trial court after hearing learned counsel for parties and assessment of evidence in 13(d) A.O case convicted and sentenced the accused as stated above. It may be mentioned here that trial court/learned Sessions Judge/special court for CNS framed charge against accused under section 9-C at Exh.3, to which accused pleaded not guilty and claimed to be tried. At the trial, prosecution examined PW-1 ASI Nadir Ai at Exh.5, he produced Photostat copy of mashirnama of arrest and recovery of K.K and narcotics at Exh.5/A, PW-2 SHO Saifullah at Exh.6, he produced FIR No.43/2004 under section 9-C of CNS Act, 1997 at Exh.6/A and positive chemical report at Exh.6/B, arrival and departure entries at Exh.6/D and 6/E. Thereafter, DPP closed prosecution side vide his statement at Exh.7.

7. Statement of accused was recorded under section 342 CrPC at Exh.8 in 9-C case, in which accused claimed false implication in this case and denied recovery of 1050 grams Charas from his possession from his house. Accused pleaded that he has no concern with positive report of chemical examiner. Plea has been raised in this case that he has falsely been involved in this case at the instance of H.C Gulsher. Accused did not lead any evidence in defence and declined to give statement on oath in disproof of prosecution allegation. Trial court after hearing learned counsel for parties and assessment of evidence in 9-C of CNS, Act, 1997 case convicted and sentenced the accused as stated above.

8. Since both appeals arises out of same mashirnama, facts are identical, we have decided to dispose of both appeals by single judgment. Facts of both cases have been elaborately mentioned by the trial court in judgment, therefore there is no need to repeat the same to avoid repetition.

9. Learned counsel for appellant contended that police officials entered into house of appellant without obtaining search warrant from the competent court of

law. He further argued that it was the case of spy information, SHO had sufficient time to call independent and respectable persons of the locality to witness the recovery proceedings, but it was not done in this case. He further submitted that evidence of police officials was unreliable as the SHO concealed material facts at the time of evidence and this fact has been observed by the trial court in deposition of SHO Saifullah. He has argued that several questions were put up to the SHO in the cross examination and he replied that he does not remember. Learned advocate for appellant has argued that there are material contradictions in the evidence of prosecution witnesses. He has submitted that after recovery K.K was not sent to Ballistic expert for the report in order to ascertain whether it was in the working condition. He has submitted that K.K was also not sealed at the spot. Regarding recovery of charas, he has submitted that evidence of complainant is contradictory to the evidence of mashir on material particulars of the case. He has also submitted that there was inordinate delay in sending charas to the chemical examiner. He has submitted that no evidence has been brought on record that charas was kept in safe custody at Malkhana. It is further argued that there was no evidence regarding safe transit of charas to the chemical examiner. Learned advocate has submitted that complainant has stated that charas was in the shape of two slabs, on this point mashir has deposed that one was small piece and another piece was half. Counsel for appellant also referred to the report of chemical examiner in which it is mentioned that gross weight of parcel No. 1 was 15 grams and net weight was 10 grams and gross weight of parcel No.2 was 15 grams and net weight was 09 grams. It is argued that according to case of prosecution both samples were 10 grams which were sent to the chemical examiner. Counsel for appellant argued that there was infirmity in the prosecution case that has not been explained. Counsel has argued that specific plea has been raised by accused in his statement that he has been involved in this case at the instance of H.C Mashooq Ali. In these circumstances according to defence counsel, independent evidence was essential but that has not been brought. In

support of his contentions, he has relied upon the case of Ikramullah v. The State (2015 SCMR 1002).

10. Learned Additional P.G conceded to the most of contentions raised by learned advocate for appellant. So far recovery of KK is concerned, learned APG very rightly conceded that police officials had entered into house of appellant without obtaining search warrant. He further argued that KK was neither sealed at the spot nor it was sent to the Ballistic expert for report. Learned Additional P.G has also pointed out that according to mashirnama of arrest and recovery, total 500 bullets were recovered but PW-1 Nadir Ali has deposed that 30 live bullets were recovered from the possession of appellant. Learned Additional P.G further pointed out that there was delay in sending charas to the chemical examiner. Learned Additional P.G has rightly conceded that there was also no evidence regarding safe custody of charas at Malkhana and there was no evidence regarding safe transit of charas to the chemical examiner, PC Wahid Ali who had taken charas has also not been examined by prosecution. In these circumstances learned APG did not support the impugned judgment of the trial court.

11. We have carefully heard the learned counsel for the parties and perused the evidence minutely.

12. We have come to the conclusion that prosecution has failed to establish it's case against appellant in both cases for the reasons that it was case of spy information. The house of appellant is situated according to evidence, in the thickly populated area, no sincere efforts were made by the SHO to call independent persons of the locality to witness the recovery proceedings. It was highhandedness of police officials to enter into house without observing legal formalities. Moreover, story as set up by prosecution appears to be unnatural and unbelievable as according to case of prosecution accused was sitting on cot and two pieces of charas and KK were lying on cot, for what purpose we are unable to understand. Moreover, after recovery of K.K it was neither sealed nor sent to the

ballistic expert for report in order to ascertain whether it was in working condition. SHO concealed material facts from the trial court which fact is evident from the note of trial court in deposition. After recovery, it appears that investigation was not fairly conducted and charas was sent to the chemical examiner with inordinately delay on 28.4.2004. Delay of 10 days in sending charas has also not been explained. Moreover, crucial issue involved in this case was safe custody of charas, it appears that nowhere SHO in his evidence has deposed that after recovery he kept charas in safe custody at Malkhana, there was also no evidence regarding safe transit of charas to the chemical examiner. Even PC Wahid Ali who had taken charas has not been examined before trial court. Surprisingly, K.K's number was rubbed, who rubbed it has not been explained. Moreover, trial court has conducted trial in both cases separately but in casual manner and evidence was recorded in one case and same evidence was kept on record in other trial/case. It is the requirement of law that in every case evidence is to be recorded separately, that has not been done in this case. There is one more infirmity in the prosecution case. The description of charas mentioned in Mashirnama of recovery was different from that it was received by the chemical examiner. In the case of Ikramullah v. The State (2015 SCMR 1002), on the point of safe custody of charas the Honourable Supreme Court of Pakistan has held as under;

*“5. In 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.”*

13. In these cases, there are several circumstances/infirmities in the prosecution case, which created reasonable doubt about the guilt of the appellant. In the case of Tariq Pervez v. The State reported in 1995 SCMR 1345, the Honourable Supreme Court of 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”.*

14. For the above stated reasons, we have come to the conclusion that prosecution has failed to prove it’s case against the appellant. Therefore, by extending benefit of doubt, both appeals are allowed. The conviction and sentence recorded by the trial Court against appellant vide judgment dated 10.10.2009 are set-aside. Appellant Ajab Ali alias Qadirdad is acquitted of the charge. He is present on bail, his bail bond stands cancelled and surety is discharged.

**JUDGE**

**JUDGE**