

ORDER SHEET
IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR.

CRIMINAL APPEAL NO. D- 55 OF 2012.

For regular hearing.

Present:

**Mr. Justice Naimatullah Phulpoto &
Mr. Justice Syed Muhammad Farooq Shah.**

For appellant:

Mr. Qurban Ali Malano.

For the State:

Syed Srdar Ali Shah, APG for the State.

Date of hearing: 6th June, 2013.

JUDGMENT

NAIMATULLAH PHULPOTO, J- Appellant Mehmood Ali was tried by learned Sessions/Special Judge, CNS, Sukkur in special case No. 1 of 2011, State-Versus-Mehmood Ali, under section 9-C of CNS Act, 1997 and after full-dressed trial, vide judgment dated 8.8.2012, appellant Mehmood Ali was convicted under section 9-C of CNS Act, 1997 and sentenced to 11 years and 6 months RI with fine of Rs. 55,000/- or in default to suffer SI for 8 months and 15 days. Benefit of section 382-B Cr.P.C. was extended to the appellant. The appeal has been preferred against the aforesaid judgment.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 20.12.2010, SHO/SIP Abdul Malik Kamangar of P.S.B-section, Sukkur left P.S. along with ASI Ghulam Murtaza Junejo, HC/Intizar Hussain, PC/ Faiz Muhammad and PC/Abdul Ghaffar, vide roznamcha entry No. 20 at 1200 hours, in police mobile driven by PC-Ali Nawaz for patrolling. While patrolling at various places, when they reached at Neem Ki Chari, where SHO received spy information that one Mehmood Ali was coming for selling charas on his motorcycle to Ayub Gate, Sukkur. On such information, police party proceeded to Paracha hospital, Sukkur, in the meanwhile, motorcycle appeared on road and on its oil tank there was basket. He was identified by PC-Fateh Mohammad as police constable Mehmood Ali, who was driving motorcycle. Appellant was given signal to stop his motorcycle, he was confused while seeing the police party and speed up motorcycle. In the meanwhile, basket fell down from oil tank of motorcycle and appellant succeeded to drive away. Basket was taken by SHO in presence of police mashirs as the private persons were not available at the relevant moment. Thereafter, SHO made ASI Ghulam Murtaza and HC Intizar Hussain as Mashirs and basket of appellant was opened in their presence, it contained 9 slabs/patties of charas, on which words "Cutter Choice" were written.

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Charas was weighed and it came to 9 KGs, from each slab/patti 100 grams were drawn, total 900 grams for sending to chemical examiner, in all 900 grams were separated and sealed for chemical examination. Thereafter, remaining charas was separately sealed. SHO returned back to P.S. along with recovered narcotics substance and lodged the FIR against P.C. Mehmood on behalf of State under section 9(c) Control of Narcotics Substance Act, 1997. Thereafter, he supplied copy of Mashirnama of recovery, FIR and case papers to the I.O. for investigation of the case.

3. Investigation Officer visited place of recovery in presence of mashirs, recorded 161 CrPC statements of PWs, despatched the sample of 900 grams charas to chemical examiner on 23.12.2011 for analysis. Investigation Officer received positive chemical report. During investigation I.O. could not arrest the appellant and submitted challan against appellant under section 512 CrPC.

4. Thereafter, appellant was arrested and was remanded to jail. A charge against appellant was framed at Ex.2, under section 9(c) of Control of Narcotics Substance Act, 1997, appellant pleaded not guilty and claimed trial.

5. In order to substantiate the charge, prosecution examined witnesses, namely complainant SIP Abdul Malik Kamanger at Ex.4, PW/Mashir ASI Ghulam Mustafa at Ex.5, LPC- Faiz Muhammad at Ex.6, and SIO-Maqsood Rasool at Ex.7. Thereafter, prosecution side was closed.

6. Statement of appellant was recorded under section 342 Cr.P.C. at Ex.9, in which he claimed to be innocent and denied the charge. He stated that PWs have deposed against him falsely as he had refused to act as mashir in false cases. He has been involved in this case falsely at the instance of SHO Abdul Jabbar. He has further stated that he has been involved falsely as the I.O. of this case namely Maqsood Rasool is close relative of SHO Abdul Jabbar Mahar. Appellant declined to examine himself on oath in disproof of prosecution allegations. Appellant has also not led evidence in defence.

7. On conclusion of prosecution evidence, learned trial court after assessment of evidence, convicted and sentenced the appellant as stated above.

8. We have carefully heard learned counsel for the appellant and learned State Counsel and scanned the entire evidence.

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9. From the perusal of evidence of complainant SHO Abdul Malik, it appears that he has stated that on 20.12.2010, he was posted at P.S, B-section, Sukkur. On the same day, he along with ASI-Ghulam Murtaza Junejo, HC-Intizar Ahmed, PC- Abdul Ghaffar and PC-Faiz Mohammad left PS at 12.00 noon vide roznamcha entry No. 20 in police mobile driven by PC- Ali Nawaz for patrolling. While patrolling when police party reached at Neem Ki Chari, SHO received spy information that one police constable namely Mehmood Ali Mahar would pass with charas on motorcycle through Ayoub Gate road. Police party proceeded to pointed place. At about 1-pm, they noticed a person having one basket on the oil tank of motorcycle was coming from Ayoub gate who was identified by PC Faiz Mohammad as Mehmood Mahar. Accused was signaled by police to stop whereupon he took a sharp turn and basket fell down on the road and appellant drove away his motorcycle. Basket was taken up and found containing nine slabs of charas, wrapped in a plastic cover with word "Cutters Choice". Each slab was weighed which came to 1000 grams, total 9 KGs, out of which 100 grams were taken from each slab separately sealed for sending to chemical examiner for analysis and remaining charas was sealed separately in presence of mashirs ASI Ghulam Murtaza and HC Intizar Hussain, mashirnama of recovery of charas was prepared. Charas was brought by SHO to the P.S, where he lodged FIR against appellant on behalf of State. In his cross-examination, complainant/SHO admitted that registration number and colour of motorcycle have not been mentioned by him in the case. However, he denied the suggestion that charas has been foisted upon the accused at the instance of SHO Abdul Jabbar Mahar.

10. PW-2 ASI/Mashir Ghulam Murtaza has deposed that on 20.12.2010, he along with SHO Abdul Malik Kamagar and other police staff left for patrolling in the government vehicle. SHO received spy information, thereafter at about 1.00 p.m, Nakabandi was held at Anwar Paracha hospital road, meanwhile, police saw that one person was coming on motorcycle with a basket on its oil tank. He was identified by PC Faiz Mohammad Junejo as Mehmood Mahar. It is stated that despite signal to the accused to stop motorcycle, he took sharp turn, meanwhile basket dropped from his motorcycle and appellant succeeded to drive away. SHO took basket, made him mashir. HC-Intizar was co-mashir, in the basket there were nine slabs/patties of charas, on which words "Cutter Choice" were written, total weight of slabs was 9 kgs, from each slab/patti 100 grams were taken total 900 grams as sample for sending to chemical examiner. He has stated that after recovery, sample and remaining substance were separately sealed in his presence as well as in presence of co-mashir. Mashirnama was prepared, thereafter charas was brought to P.S, where SHO lodged FIR against appellant on behalf of State under section 9(c) Control of

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Narcotics Substance Act, 1997. In his cross-examination, he denied the suggestion that he has deposed falsely at the instance of complainant/SHO, however, he stated that place from where recovery was made is a busy area of Sukkur city.

11. PW-3 PC Faiz Muhammad has stated that on 20.12.2010 he was member of police party headed by SHO Abdul Malik. SHO received spy information during patrolling, thereafter Nakabandi was held at Anwar Paracha hospital road, at about 1.00 pm, a person appeared on motorcycle on the road. He was directed to stop motorcycle but he accelerated it but basket fell down. He was identified by PC-Faiz Mohammad as Mehmood Mahar. Thereafter, basket was opened by SHO by making ASI Ghulam Murtaza and HC-Intizar as mashirs. Basket was opened, it contained 9 slabs of charas, weight of each slab was one KG, total weight of charas was 9 KGs. Sample of 100 grams were drawn from each slab. Mashirnama was prepared. Thereafter, SHO lodged FIR on behalf of State against appellant. During investigation he stated that his statement was also recorded. In his cross-examination, he stated that appellant was known to him and he was posted at PP Arain Sukkur as constable. He has also stated that private persons were not willing to act as mashirs, however, he denied the suggestion that he was deposing falsely against the accused at the instance of SHO Abdul Malik.

12. PW-4 Maqsood Rasool, I.O of the case has deposed that on 20.10.2010, he received a copy of FIR bearing crime No. 219 of 2010, registered against appellant under section 9-C of CNS Act, 1997. He had also received mashirnama of recovery of charas and sealed basket containing charas. He has stated that he inspected the place of Vardhat in presence of mashirs, recorded 161 CrPC statements of PWs and dispatched charas to chemical examiner on 23.12.2010. He could not arrest the appellant during investigation. On completion of investigation, he submitted challan against accused. In his cross-examination, I.O stated that no identification parade was arranged by him. He also stated that motorcycle was not recovered. He has denied to a suggestion that he has not conducted investigation in a fair manner.

13. Learned counsel for the appellant contended that neither appellant was arrested at the spot nor basket containing charas was recovered from his possession. It is further contended that prosecution story is unbelievable. Police party was armed with official arms and ammunition and it was impossible for the appellant to drive away. It is submitted that after arrest of appellant he was not put to the identification parade and identification of appellant by PC-Fateh Mohammad at spot was doubtful. It is also contended that place of recovery is thickly populated area but no private

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person of the vicinity was made as mashir of recovery and evidence of police officials without independent corroboration was unsafe for the purpose of conviction. Mr. Malano has contended that there was delay in sending charas to the chemical examiner for which no explanation has been furnished. Lastly it is submitted that defence plea was not considered by the trial court. Case is highly doubtful and benefit of doubt may be extended to the appellant.

14. Syed Sardar Ali Shah, APG argued that the prosecution witnesses have fully supported the case of prosecution. No major contradiction has been brought on record. Evidence of the police officials is confidence inspiring. Prosecution witnesses had no enmity with the appellant to foist upon him such huge quantity of charas. He has also argued that non-compliance of mandatory provision of section 103 CrPC would not be fatal to the prosecution case as in the narcotics cases, section 25 of the CNS Act, 1997 clearly excludes application of section 103 CrPC. Learned APG further argued that there was no delay in sending charas to the chemical examiner as it was sent to chemical examiner within 72 hours. It is argued that evidence of police officials is as good as that of private persons. It is argued that defence plea was afterthought and it was considered by trial court. Appellant was police constable and the police constable PW Faiz Mohammad had no difficulty to identify his colleague. It is also submitted that appellant was also identified in the court by all prosecution witnesses. Prosecution has proved its case against the appellant. Lastly, it is argued that appellant was sitting on driving seat of motorcycle alone, he was responsible for transportation of narcotics. In support of his contentions, reliance has been placed on the cases of Muhammad Khan v. The State (2008 SCMR 1616) and Kashif Amir v. The State (PLD 2010 SC 1052).

15. After hearing learned counsel, we have carefully scanned the entire evidence brought on record.

16. From the perusal of evidence of prosecution witnesses, it appears that SHO had received spy information and Nakabani was held on the road on 20.12.2010. Appellant appeared on motorcycle at 1:00 pm, on seeing police party basket placed by him on the oil tank of motorcycle fell down and appellant drove away his motorcycle. He was identified by PC-Faiz Mohammad as PC Mehmood Mahar. Evidence of all PWs is consistent on all the material particulars such as date, time, place and manner of recovery of basket containing charas weighing 9 KGs. Learned defence counsel has argued that there are material contradictions in the evidence of PWs, but no material contradiction has been noticed in the evidence of PWs. However, some minor contradictions have been found which could not be sufficient to cut the roots of the prosecution case, such discrepancies are bound to occur due to

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lapse of considerable time. There is no force in the contention of learned defence counsel that appellant was not arrested at the spot nor charas was recovered from his possession for the reasons that the appellant was identified by PW PC-Faiz Mohammad and after his arrest he was identified by all PWs in the court. Basket containing charas fell down from oil tank of motorcycle while seeing the police party and it was recovered by SHO in presence of mashris. Basket was opened in presence of mashirs, it contained 9 slabs of charas, total 9 KGs charas. From each slab/patti 100 grams charas were taken as sample. Total 900 grams were taken for sample and sent to chemical examiner within 03 days. Positive report of chemical examiner has been produced in evidence. It is also settled law that the evidence of police officials is as good as of any other public witness in absence of any malice or mala fide of the police officials. In this case prosecution witnesses had no enmity whatsoever with the appellant to foist such a huge quantity of charas upon him. Once prosecution has proved its case then under section 29 of CNSA burden shifts upon the accused to prove contrary to the plea of the prosecution. Chemical examiner report regarding charas was positive; it proved that substance recovered from the appellant was charas. Prosecution discharged its initial onus while proving that the substance recovered from him was charas. It was proved by cogent evidence that appellant was found driving motorcycle and he was responsible for transportation of narcotics, as held by Hon'ble Supreme court in case of **Kashif Amir v. The State (PLD 2010 SC 1052)**. Relevant portion is reproduced as follows:

“It is well settled principle that a person who is on driving seat of the vehicle, shall be held responsible for transportation of the narcotics, having knowledge of the same as no condition or qualification has been made in the section 9(b) of CNSA that the possession should be an exclusive one and can be joint one with two or more persons. Further, when a person is driving vehicle, he is Incharge of the same and it would be under his control and possession, hence, whatever articles lying in it would be under his control and possession. Reference in this behalf may be made to the case of Muhammad Noor v. The State (2010 SCMR 927). Similarly, in the case of Nadir Khan v. State (1988 SCMR 1899) this court has observed that knowledge and awareness would be attributed to the Incharge of the vehicle. Another aspect of the case is that once the prosecution has prima facie established its case then under section 29 of the CNSA burden shifts upon the accused to prove contrary to the plea of the prosecution. Reliance in this behalf may be made to the case of Ismaeel v. The State (2010 SCMR 27) wherein this court, while relying upon the case of Muhammad Ashraf v. The State (2007 SCMR 1378) and Mst. Taj Bibi v. The State (2007 SCMR 1591) has held that the Chemical Examiner's reports regarding Charas and Opium were sufficient to prove that the substance recovered from the accused was Charas which can be used to cause intoxication; the prosecution had discharged its initial onus while proving that substance was recovered from him whereas the petitioner had failed to discharge its burden in terms, of section 29(d) of CNSA. In this behalf reference can also be

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made to the case of Ikram Hussain v. The State (2005 SCMR 1487) wherein it has been held that in terms of section 29(d) of the Control of Narcotics Substances Act, 1997 unless otherwise proved, the presumption would be that the person who is found in possession of the narcotics has committed an offence”.

In recent unreported judgment passed in Jail Petition No. 295 of 2012 re: Mir Rais Khan v. The State, Hon’ble Supreme Court of Pakistan, vide order dated 3.5.2013, was pleased to observe as under:

“The petitioner was the driver of the coach which was intercepted by the Excise Inspector of Pakistan Kashmore on 3.2.2009 and the 68 bundles of charas weighing 1250 grams (total 85 kilograms) were recovered. Petitioner was apprehended at the site. The chemical report of the narcotic is positive. All the witnesses have withstood the test of cross-examination. No mala fide has been established against the prosecution for involving the petitioner in this case. The plea propounded by the petitioner in the noted petition, that narcotic was not recovered from his possession, suffice it to say that he was the driver of the coach, from the roof whereof charas was recovered and thus as per the settled law, he shall be considered to be in possession of the said narcotics. The two courts below have founded their decisions on the basis of proper reading of the evidence on the record and the factual conclusions drawn are not shown to suffer from any misreading or non-reading. Thus, on account of the above, I do not find any reason to interfere with the impugned decision. Therefore this case is not fit for grant of leave and the petition is liable to be dismissed”.

17. Evidence of police officials is reliable and corroborated by positive chemical examiner’s report. All the prosecution witnesses withstood the test of cross-examination but no mala fide against them have been brought on record. Contention of defence counsel for non-holding of the identification parade is without substance for the reasons that the appellant belonged to police department and he was identified by PC-Fateh Mohammad with whom appellant served in the police department. Even otherwise, holding of identification is not the legal requirement. Prosecution witnesses identified the accused before the court and that is sufficient. Reliance in this regard can be placed upon the case of Ghazanfar Ali alias Pappu and another v. The State (2012 SCMR 215). Relevant portion is reproduced as follows:

“Even otherwise the holding of identification parade is not mandatory and it is merely a corroborative piece of evidence. If the statement of a witness qua the identity of an accused even in Court inspires confidence, if he is consistent on all material particulars and there is nothing in evidence to suggest that he is deposing falsely, the absence of holding of identification parade would not be fatal to the prosecution case”.

18. Under section 29(d) of CNS Act, 1997 presumption would be that a person who was found in possession of narcotics had committed offence unless otherwise

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proved. Appellant failed to discharge burden to show that he was not in possession of narcotics when the basket dropped from his motorcycle. Contention of Mr. Malano that all the PWs belonged to police department and their evidence was unreliable is without legal force for the reasons that PW PC Faiz Muhammad has stated that private persons were not willing to act as mashir in this case. Generally it has been observed that people from public avoid to act as mashir in the narcotics cases. Charas was sent to chemical examiner within 72 hours after seeking permission from the competent authority as such and there was no delay in sending the charas to the chemical examiner. Contention in this regard is devoid of any legal force. Defence plea appears to be afterthought. It is absolutely unbelievable that complainant/SHO would involve the appellant who is police constable in this case simply for the reason that he had refused to act as mashir in a false cases prepared by SHO. If it would have been so, it would be easier for the SHO to get the appellant transferred from his police station. Non-recovery of motorcycle was immaterial in this case. Trial court on the basis of huge evidence has convicted the appellant in this case.

19. For the above stated reasons, we have no hesitation to hold that the prosecution has proved its case against the appellant beyond any shadow of doubt as the trial court has appreciated the evidence in accordance with the settled principle of law. Judgment of trial court dated 8.8.2012 is based upon sound reasons and requires no interference and same is maintained. Consequently, appeal is found without merit and same is dismissed.

JUDGE

JUDGE

Ahmad