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IN THE HIGH COURT OF SINDH AT KARACHI

(Criminal Appellate Jurisdiction)

Criminal Appeal No. **165** of 2014

Ameen S/O Abdul Latif
Muslim, Adult
R/O. Kachi Abadi
Safoora Goth, Near
Khybar Hotel Karachi
Presently confined in
Central Jail Karachi.....

30-5-14
30/5/2014

2275

Verus

The State..... Respondent

FR 205/2013
U/S 6/9-CNS Act, 1997
P.S. CID High Karachi

Remind
A. Saad
30/5/14

CRIMINAL APPEAL UNDER SECTION 410 C.P.C.
R/W SECTION 18 OF CNS ACT 1997, AGAINST
JUDGMENT DATED 19.05.2014 PASSED BY SPECIAL
COURT CNS-II KARACHI IN SPECIAL CASE NO.
207/2013, CONVICTING THE APPELLANT FOR 187
YEARS AND (06) MONTHS AND ALSO IMPOSE FINE
OF Rs. 35,000/= AND DEFAULT TO SUFFER FOR SIX
MONTHS (15) DAYS.

Being aggrieved at and dissatisfied with the impugned judgment dated 19.05.2014 (Certified copy of the Judgment filed as Annexure "A") the appellant above named beg to prefer this appeal in consideration of amongst others the following facts and grounds and pray that this Hon'ble Court may be pleased to admit the appeal and after calling for the record and proceeding of the above said Special

HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No. 165 of 2014

Present

Mr. Justice Naimatullah Phulpoto

Mr. Justice Mohammad Karim Khan Agha

JUDGMENT

Date of Hearing : 27.10.2016
Date of Judgment : 04.11.2016
Appellant : Ameen through Mr. Obaidullah Advocate
Respondent : The State through Ms. Secma Zaidi APG

NAIMATULLAH PHULPOTO, J.- Appellant Ameen son of Abdul Latif was tried by learned Judge, Special Court-II (C.N.S) Karachi in Special Case No. 207 of 2013 for offence u/s 9(c) of the CNS Act, 1997. On the conclusion of the trial, appellant was convicted u/s 9(c) of the CNS Act, 1997 and sentenced to 07 years and 06 months R.I and to pay fine of Rs.35,000/- in case, of default in payment of fine, he was ordered to suffer SI for 06 months and 15 days more. Appellant was extended benefit of Section 382-B Cr.P.C.

2. Brief facts in nutshell are that on 03.03.2013, ASI Muhammad Ashraf of PS CID Sindh, Civil Lines, Karachi, left police station along with his subordinate staff namely HC Muhammad Kashif, PCs Dastagir, Ishtiaq Ahmed, Mehboob, Sarfaraz and Driver P.C.Arshad Khan in the police mobile for patrolling. When the police party reached at Mouch Goth, ASI Muhammad Ashraf received spy information that two persons were coming on motorcycle from Mouch Goth to Mazar of Syed Qasim Ali Shah. On such information, police party proceeded to the pointed place, where it is alleged that two persons emerged on motorcycle bearing No. KGW-7976. It was stopped and the person who was riding the motorcycle, on enquiry disclosed his name as Jamil while another person sitting behind the rider disclosed his name as Amin (present appellant). On the personal search of accused Amin, ASI recovered from his possession five packets of Charas weighing 5 KGs in the shape of slabs. On his further personal search, 30 bore pistol with 4 live bullets and one hand grenade were recovered as well as cash of Rs.520/-. ASI conducted personal search of

another accused namely Jamil and recovered one 30 bore pistol with 3 live bullets. Both the accused had no licenses for the weapons carried by them. ASI prepared mashirnama of arrest and recovery of the narcotics and weapons in presence of mashirs namely HC Muhammad Kashif and PC Ghulam Dastagir and sealed the Charas at the spot. Thereafter, both the accused along with narcotic substance and weapons were brought to the police station CID, where FIR bearing Crime No. 205/2013 under Sections 6/9(c) of the CNS Act, 1997 was registered against accused Amin by ASI on behalf of State.

3. After registration of the FIR, its investigation was entrusted to SIP Jamil Ahmed Awan, who recorded 161 Cr.P.C statements of the P.Ws, visited place of occurrence, sent narcotics substance to the chemical examiner for chemical analysis. He received positive chemical report. After usual investigation, challan was submitted against accused Amin under Section 9(c) of the CNS Act, 1997.

4. Trial Court framed charge against accused under Section 9(c) of the CNS Act, 1997 at Ex.3. Accused pleaded not guilty and claimed to be tried.

5. In order to substantiate the charge, prosecution has examined the following witnesses:

- (i) *PW-1 Complainant/ASI Muhammad Ashraf at Ex.4.*
- (ii) *PW-2 HC Muhammad Kashif Khoso at Ex.5.*
- (iii) *PW-3 SIP Jamil Ahmed Awan at Ex.6.*

Prosecution side was closed at Ex.7.

6. Statement of accused Amin was recorded u/s 342 Cr.P.C at Ex.8, in which he has claimed false implication in this case and denied the recovery of the narcotic substance. Appellant did not lead any defence and declined to give statement on oath, in disproof of the prosecution allegations.

7. Trial Court after hearing the learned counsel for the parties and on assessment of the evidence, convicted and sentenced the appellant as stated above. Appeal has been preferred against the impugned judgment.

8. Mr. Obaidullah learned counsel for the appellant contended that it was the case of spy information inspite of that ASI Muhammad Ashraf failed to call independent and respectable persons from Mazar of Qasim Ali Shah. He further contended that all the P.Ws are police officials and their evidence

required independent corroboration, which was lacking in this case. He has argued that according to the prosecution case 5 KGs charas was recovered from the possession of the appellant on 04.03.2013 but the same was sent to the chemical examiner on 11.03.2013. It is contended that the delay in dispatching of the Charas to the chemical examiner would be fatal to the prosecution case. Lastly, it is argued that prosecution has failed to prove its case against appellant Amin. In support of his contentions, he has relied upon the cases reported as Abdul Majeed versus The State (SBLR 2015 Sindh 779) & Imdad Ali Junejo vs. The State (2002 P.Cr.L.J 1086).

9. Ms. Seema Zaidi learned APG argued that prosecution has proved its case against the appellant. It was night time incident and private persons were not available at the time of recovery of the charas from the possession of the accused. Learned APG further argued that police officials had no enmity to foist huge quantity of charas upon the appellant. It is further argued that arrival and departure entries were produced before the trial Court to prove that police party had actually left for patrolling duty and recovered narcotics from the possession of the appellant. Learned APG further argued that Charas recovered from the possession of the accused was sent to the chemical examiner and positive report has been produced before the trial Court. As regards to delay in sending the Charas to chemical examiner, it is argued by learned APG that delay in sending Charas to the concerned quarters for expert opinion cannot be treated fatal to the prosecution case in absence of objection regarding the same having been tempered with or manipulated. This plea of manipulation has not been raised by accused before the Trial Court. Lastly, it is argued that trial Court has rightly appreciated the evidence and convicted and sentenced the appellant in accordance with law. In support of her contentions, she has relied upon the cases reported as Ghulam Murtaza and another vs. The State (PLD 2009 Lahore 362) & Ameer Zeb vs. The State (PLD 2012 SC 380).

10. We have examined the prosecution evidence minutely. ASI Muhammad Ashraf has deposed that on 03.03.2013, he left police station CID Sindh, Civil Lines, Karachi along with his subordinate staff vide Roznamcha entry No.13 at 2235 hours. During patrolling when he reached at Mouch Goth, he received spy information that two persons were coming on motorcycle from Mouch Goth to Mazar of Syed Qasim Ali Shah. Police party saw one motorcycle, it was stopped. Motorcycle was being driven by accused Jamil, while present appellant was sitting on backside. ASI conducted personal search of accused

Amin in presence of the mashirs and recovered 5 packets of Charas weighing 5 KGs in shape of slabs. Each packet contained two slabs of Charas. 30 bore pistol, 4 live bullets and one hand grenade were also recovered from the possession of accused Amin and from another accused Jamil, 30 bore Pistol with 3 live bullets were recovered. ASI arrested the present accused in presence of the mashirs, sealed the narcotic substance in their presence on 04.03.2013 at 0030 hours. Thereafter, brought both the accused at police station along with narcotic substance and weapons/ammunition and he lodged the FIR against accused Amin vide Crime No. 205/2013 on 04.03.2013 under Section 9(c) of the CNS Act, 1997 and made Roznamcha Entry No.16 at 0200 hours on 04.03.2013 and produced mashirnama of arrest, FIR and Roznamcha entries before the Trial Court. Thereafter, he has stated that he handed over copy of the FIR to IO SIP Jamil Ahmed Awan. ASI was cross-examined at length. ASI denied the suggestion that he had arrested accused Amin near National Medical Centre, Kala Pull, Karachi. ASI has also denied the suggestion that no Charas was recovered from accused Amin.

11. P.W-2 HC-Muhammad Kashif Khoso has narrated the same facts and stated that he was made as mashir by ASI. On 04.03.2013 at 0030 hours ASI recovered five packets of Charas from the possession of accused Amin, 30 bore pistol from the fold of his Shalwar and one hand grenade. He was made as mashir. Co-mashir was PC Ghulam Dastagir. He has further stated SIP Jamil Ahmed Awan had recorded his 161 Cr.P.C statement. In his cross-examination HC/Mashir has denied the suggestion that accused was arrested by ASI near National Medical Centre. He has denied the suggestion that he was deposing falsely at the instance of complainant/ASI.

12. Investigation in this case has been carried out by ASI Jamil Ahmed Awan. He has deposed that on 04.03.2013, he was posted at CID Civil Line, Karachi. On the same date, FIR bearing No. 205/2013 u/s 9(c) of the CNS Act, 1997 was entrusted to him for investigation, as well as mashirnama of arrest and recovery. He inspected the place of incident on the pointation of ASI Muhammad Ashraf. He recorded 161 Cr.P.C statements of the P.Ws. On 11.03.2013, he had sent the narcotics substance to the chemical examiner and received positive report on 18.03.2013. IO further deposed that present accused *is involved in several cases and produced copies of the 7 FIRs of different crimes as Ex.6/C-1 to 6/C-7.* In cross-examination, IO denied the suggestion that it was false case against accused Amin.

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

14. The contention of learned counsel for the appellant that at the time of personal search of the accused Amin, ASI had failed to associate private persons as witnesses is devoid of legal force for the reason that it was 0030 hours, private persons at such odd hours of the night were not available, as such question of association of the private persons did not arise. As regards to another contention of learned defense counsel that all P.Ws are police officials, mere fact that prosecution witnesses are police officials, by itself, cannot be considered a good ground to discard their statements, as the police officials are as good witnesses as private persons of the society. Reference in this context can be made to the case of Riaz Ahmad alias Raju v. The State, (2004 SCMR 988). Relevant portion is reproduced as under:

'We have considered the contentions and have gone through the documents appended with this petition. The argument of the learned counsel that the testimony of police officials does not inspire confidence is totally devoid of any force. Nothing has been brought on record that any of the witnesses was having any malice against the petitioner. The police officials are as good witnesses as private persons of the society. The testimony of the prosecution cannot be thrown over board simply on the ground that it has come from the police officials.'

15. Learned counsel for the appellant contended that Charas was sent to the Forensic Science Laboratory after 07 days of recovery and under the Control of Narcotic Substances (Government Analysts) Rules, 2001, recovered Charas should have been sent to chemical examiner within seventy two hours of recovery. It is contended that due to delay, positive report received in this case cannot be relied upon. It is observed that above Rules had placed no bar on the Investigating Officer to send the samples beyond seventy two hours of the seizure. The very language employed in the rules and the effect of its breach provided therein have made the rules directory and not mandatory. These rules cannot control the substantive provisions of the C.N.S. Act 1997 and be applied in such a manner that their operation shall not frustrate the purpose of the Act under which these rules are framed. Further, failure to follow the rules would not render the search, seizure and arrest under the C.N.S. Act an absolute nullity and make the entire prosecution case doubtful, except for the consequence provided in the rules. In directory provisions substantial compliance is sufficient and even where there is no compliance at all, the act is not invalidated by such non-compliance if the act otherwise is done in accordance with law. The delay of 7 days otherwise in sending the Charas to

the chemical examiner for expert opinion cannot be treated fatal to prosecution case in the absence of objection regarding the same having been tampered with or manipulated. There is no allegation of the accused Amin that Charas was tampered with during the process of transit. It was for the appellant to have taken such plea before the trial Court but the appellant did not do so. However, we have examined the chemical Analyzer's report and found that the sealed parcel was received by him on 11.03.2013. In the absence of any allegation of tampering with the property, the argument of learned counsel for the appellant is without substance as held in the case of Tariq Mehmood v. The State through Attorney-General (PLD 2009 SC 39).

16. In another case of Gul Alam vs. The State through Advocate General, NWFP, Peshawar (2009 PSC (Crl.) 600), Honourable Supreme court has been pleased to observe that there is no bar on the I.O to send the samples beyond 72 hours of seizure.

'12. Adverting to the objection regarding late dispatch, it may be noted that rules 4 and 5 of the Control of Narcotic Substances (Government Analysts) Rules, 2001 placed no bar on the Investigation Officer to send the samples beyond seventy-two hours of the seizure, receive the F.S.L report after fifteen days and the report so received to place before the Trial Court. The very language employed in the rules and the effects of its breach provided therein have made the rules directory and not mandatory. These rules cannot control the substantive provisions of the C.N.S.A and to be applied in such a manner that its operation shall not frustrate the purpose of the Act under which these are framed. Further, failure to follow the rules would not render the search, seizure and arrest under the C.N.S.A an absolute nullity and non-est and make the entire prosecution case doubtful, except for the consequence provided in the rules. In directory provisions substantial compliance is sufficient and even where there is no compliance at all, the act is not invalidated by such non-compliance if the act otherwise is done in accordance with law. The delay otherwise in sending the incriminating articles to the concerned quarter for expert opinion cannot be treated fatal in the absence of objection regarding the same having been tampered with or manipulated. There is no allegation of the petitioner that the property was tampered with during the process of transit or the remaining property was not 'charas'. It was for the petitioner to have taken such plea before the Trial Court but the petitioner did not do so. However, we have examined the Chemical Analyzer's report and found that the sealed packets were received by him which contained the signatures of marginal witnesses. In the absence of any allegation of tampering with the property, the argument of learned counsel for the petitioner is not sound. Tariq Mehmood v. The State through Deputy Attorney General Peshawar (PLD 2009 SC 39).

17. In the present case, there was no allegation of tampering with the property, therefore, the contention that there was delay in sending the Charas to the chemical examiner would not be fatal to the prosecution case.

18. Reverting to the last contention of the learned counsel for appellant that the prosecution has failed to prove its case beyond any shadow of doubt, we have minutely perused the evidence of the complainant, mashir and I.O, which

appears to be confidence inspiring and trustworthy. ASI has clearly stated that on the relevant date he left police station along with his subordinate staff for patrolling and he received spy information and on receipt of such information he proceeded to the Mazar of Syed Qasim Ali Shah where present accused along with other accused appeared on motorcycle and ASI recovered 5 KG Charas, unlicensed weapon and a hand grenade from the possession of the present appellant and an unlicensed weapon from the possession of other accused. Mashirnama of arrest and recovery was prepared by ASI in presence of the mashirs, property was sealed at the spot. Thereafter, ASI brought the accused and case property at police station and lodged FIR against present accused Amin under Section 9(c) of the CNS Act, 1997. Despite lengthy cross-examination no inherent defect in the evidence of ASI has been brought on record. Even no enmity has been suggested with ASI. Departure and Arrival entries were produced by A.S.I before the trial Court to satisfy the court that police party had actually left on 03.03.2013 for patrolling duty. Charas was recovered from the possession of the appellant Amin on 04.03.2013 at 0030 hours and the same was despatched by the I.O to Chemical examiner on 11.03.2013. Chemical Examiner in his report has mentioned that he had received one sealed parcel. Evidence of mashir is also confidence inspiring. He has fully supported the complainant, as he had also no motive to falsely implicate the accused in this case. Evidence of I.O is also quite reliable. He had no reason to falsely challan the appellant in this case. Counsel for the appellant has failed to point out any material contradictions in the evidence of the prosecution witnesses. Therefore, there is no reason to disbelieve the prosecution evidence.

19. Learned counsel for the appellant Amin could not point out any misreading or non-appreciation of the evidence, we also do not find any illegality or infirmity in the impugned judgment so as to justify interference of this Court.

20. For the above stated reasons, we have come to the conclusion that prosecution has proved its case beyond any shadow of doubt and the trial Court has properly appreciated the evidence and rightly convicted the appellant and sentence is according to sentencing policy as enunciated in the case reported as *Ghulam Murtaza and another vs. The State (PLD 2009 Lahore 362)*, which was upheld by the Honourable Supreme Court in the case reported as *Ameer Zeb vs. The State (PLD 2012 SC 380)*.

21. For the aforesaid reasons, the appeal is without merit, the same is dismissed.

4.11.2016.
JUDGE


JUDGE