

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Criminal appeal No.D-84 of 2010.

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

For regular hearing.

Date of hearing 05.07.2017.
Date of Judgment 05.07.2017.

Appellant: Shahnawaz through Mr. Irshad Hussain
Dharejo Advocate.

Respondent. The State, Through Mr. Saieem Akhtar
Buriro Addl.P.G.

J U D G M E N T

NAIMATULLAH PHULPOTO ,J. Appellant Shahnawaz was tried by learned Sessions Judge/Special Court (CNSA), Ghotki, in Special case No.23/2009, arising out of Crime No.116 of 2009, registered at Police station Khambhra under Section 9(c) Control of Narcotic Substances Act, 1997, whereby the appellant was convicted under Section 9(c) of CNS Act, 1997 and sentenced to suffer 04 years RI and to pay fine of Rs.20,000/-. In case of default in payment of fine, he was ordered to suffer SI for 05 months more. Benefit of Section 382-B Cr.P.C was also extended to the accused.

2. Brief facts of prosecution case are that on 29.03.2009 SHO/SIP Hafeezullah Mashori left Police Station Khambhra along with his sub-ordinate staff HC Ali Gul, PCs Nadir Ali and Mumtaz Ali in Government vehicle No.SP-5700 for patrolling duty vide roznamcha entry

No.06 at 1315 hours, while patrolling various places when police party reached at Qabool curve where SIP Hafeezullah Mashori received spy information that accused Shahnawaz Dashti was present at abandoned petrol pump of Ghulam Rasool Pathan and he was selling the Charas. Police party proceeded to the pointed place where saw the present accused standing, it was 1500 hours. Accused tried to run away but he was surrounded and caught hold. It is alleged that accused was carrying plastic bag in the right hand and due to non-availability of private mashirs HC Ali Gul and PC Nadir Ali were made as mashirs. SIP Hafeezullah Mashori secured plastic bag from his possession, it was opened and contained Charas. SIP inquired name of accused, to which he disclosed his name as Shahnawaz S/o Mouj Ali by caste Dashti, he further disclosed that he had purchased Charas from one Noor Mohammad alias Nooro for selling purpose, personal search of the accused was also conducted, three currency notes of Rs.10/- were recovered from his possession, Charas was weighed, it became 1100 grams. Out of it 100 grams were separated for sending to the Chemical examiner, Charas was sealed at spot, accused was arrested, mashirnama of arrest and recovery was prepared in presence of mashirs. Thereafter accused and case property were brought at Police Station where SIP Hafeezullah Mashori lodged FIR against both the accused on behalf of State, it was recorded vide Crime No.116 of 2009 at Police Station Khambhra under Section 9(c) Control of Narcotic Substance Act, 1997.

3. After registration of the FIR, SHO handed over custody of the accused, mashirnama of arrest and recovery and case property to the SIO for investigation purpose. During investigation I.O. visited the place of wardat, he had dispatched the sample to the chemical examiner and

he received positive chemical report and on the conclusion, challan was submitted against both the accused under Section 9(c) Control of Narcotic Substance Act, 1997.

4. Case proceeded before learned Sessions Judge/Special Court CNS Ghotki, charge was framed against accused under Section 9(c) Control of Narcotic Substance Act, 1997 at Ex.4 to which they pleaded not guilty and claimed trial.

5. In order to establish the case, prosecution examined PW/complainant SHO/SIP Hafeezullah Mashori at Ex.11, who produced roznamcha entry No.6 and 8, memo and FIR at Ex.11-A to 11-D, PW HC Ali Gul at Ex.12 and PW ASI Hashmat Ali Talpur at Ex.13. Thereafter side of prosecution was closed at Ex.14.

6. The statements of accused U/s 342 Cr.P.c, were recorded at Ex.15 and 16, in which both accused claimed false implication and denied the prosecution allegations. Accused Shahnawaz has raised plea that PWs have deposed against him as his relative had filed Constitution Petition against SIP Hafeezullah Mashori when he posted as ASI at Police Station Khambra. Accused raised plea that he was victim of SIP Hafeezullah Mashori. Both accused examined themselves on oath in disproof of prosecution allegations and DWs Haji Malik, Liaqat Dashti Safdar Hussain and Niaz Hussain were also produced by the accused in their defence.

7. On the conclusion of evidence learned trial Court heard the Counsel for the parties and after assessment of the evidence convicted appellant Shahnawaz Dashti under Section 9(c) Control of Narcotic

Substance Act, 1997 as stated above, however, co-accused Noor Mohammad alias Nooro was acquitted of the charge, hence appellant Shahnawaz Dashti has preferred this appeal.

8. Mr. Irshad Hussain Dharejo, learned Counsel for appellant has mainly contended that it was the case of spy information and SHO had sufficient time to call independent persons of the locality to witness recovery proceedings but it was not done by the SIP Hafeezullah Mashori for the malafide reasons. He further contended that according to the case of prosecution, accused was arrested from the abandoned petrol pump where he was selling Charas but to whom he has sell the Charas, it has not been brought on record. He further contended that there is overwriting in departure roznamcha entry and no explanation has been furnished. He further contended that according to case of prosecution Charas was recovered from the possession of accused on 29.03.2009 and it was sent on 08.04.2009 and delay in sending the Charas has not been properly explained. Mr. Dharejo further contended that SHO Hafeezullah Mashori in his evidence has not deposed that he kept the Charas in the safe custody at the Police Station, and entry of the safe custody of malkhana has not been produced. He further argued that WHC has not been examined to satisfy the Court that Charas was actually handed over to him for safe custody. It is also argued that I.O. has also not deposed with regard to the safe transit of the Charas to the Chemical examiner. It is further contended that PC Ghulam Abbas who had taken Charas to the chemical examiner has not been examined regarding safe transit of the Charas to the chemical examiner. Lastly, it is contended that relative of the appellant had filed Constitution Petition before High Court against said SHO and Charas case has been foisted upon appellant for taking

revenge. The material contradictions in evidence have also been highlighted by him. He prayed for acquittal of the appellant.

9. Mr. Saleem Akhtar Buriro learned Addl.P.G has rightly conceded to the contentions raised by learned Counsel for the appellant with regard to safe custody of charas. Learned Addl.P.G has referred to one lacuna in the prosecution case that according to the case of prosecution, 1100 grams Charas were recovered from the possession of the accused but SIP has deposed that 1200 grams Charas were recovered from accused. He has not supported the case of prosecution.

10. We have heard the learned Counsel for the parties and perused the entire evidence.

11. We have come to the conclusion that prosecution has failed to establish its case against accused for the reasons that it was the case of spy information but SHO failed to associate independent persons of the locality to witness the recovery proceedings. In this case, we have observed that there is overwriting in the departure entry for which no plausible explanation has been furnished. There was no evidence that after recovery, Charas was kept in safe custody at Police Station Malkhana, WHC of the Police Station has also not been examined in this regard. Safe transit of charas to chemical examiner has not been established. According to the case of prosecution, PC Ghulam Abbas had taken sample to chemical examiner but he has also not been examined. Appellant has raised plea that he has been involved falsely in this case as his relative had filed Constitution Petition against SHO Hafeezullah Mashori. In these circumstances independent corroboration was required



to prove the case of prosecution but it is lacking in this case. Apart from that according to the case of prosecution the Charas was recovered from the possession of accused appellant on 29.03.2009 and it was sent with inordinate delay on 08.04.2009, to the chemical examiner. Delay in sending Charas to the chemical examiner has not been explained. In the case of *Ikramullah v. The State* (2015 SCMR 1002), 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."

12. 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".

13. 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, appeal is allowed. The conviction and sentence recorded by the trial Court against appellant vide judgment dated 29.04.2010 are set-aside. Appellant Shahnawaz Dashti is acquitted of the charge. He is present on bail, his bail bond stands cancelled and surety is discharged.

5.8.21
JUDGE

JUDGE 05/7/17