

**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT HYDERABAD**

Before:

Mr. Justice Naimatullah Phulpoto
Mr. Justice Mohammad Karim Khan Agha

Cr. Appeal No.D-29 of 2015.

Saleem and another

Versus.

The State.

Appellants : Saleem and another	Through Mr. Saad Salman Ghani, Advocate
Respondent : The State	Through Syed Meeral Shah Bukhari, APG.
Date of hearing	16.05.2017.
Date of judgment	16.05.2017.

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- This appeal is directed against the judgment dated 31.03.2015 passed by learned Special Judge for CNS, Hyderabad, in Special Narcotic Case No.46 of 2013, arising out of Crime No.165/2013, registered at Police Station (PS) Hatri, Hyderabad, under section 9(c) of Control of Narcotic Substances Act, 1997 (CNSA), whereby the appellants Saleem and Rashid Mehmood have been convicted u/s 9(c) of CNSA and sentenced to suffer RI for 04 years & 06 months and to pay the fine of Rs.20,000/- each. In case of default in payment of fine they were ordered to suffer simple imprisonment for 05 months more (the impugned judgment). Benefit of Section 382-B Cr.P.C. was also extended to the accused.

2. Brief facts of the prosecution case as disclosed in the FIR are that both the aforementioned accused were arrested on 26.09.2013 at 2200 hours at Chang Curve, Hatri Bypass, Hyderabad, by a police party headed by SIP Khalilullah Jukhio, which amongst others included HC Abdul Razzak. Accused Saleem and Rashid were said to be found possessing 1500 grams and 1250 grams charas respectively. The samples of 100 grams each were taken out from the said narcotic for chemical analysis and sealed separately. Thereafter, the contraband items, as stated above, were sealed and memo of arrest and recovery was prepared on the spot in presence of mashirs. Thereafter, accused and case property were brought at police station where F.I.R. was lodged by SIP Khalilullah Jukhio on behalf of the State under section 9(c) CNSA.

3. During investigation, Investigation Officer recorded 161 Cr.P.C. statements of the PWs. Samples of the substance / charas were sent to the chemical examiner on 07.10.2013 through PC Jeen and positive chemical report was received. On the conclusion of investigation challan was submitted against the accused for offence u/s 9(c) of CNSA.

4. Trial court framed charge against accused at Ex.2 u/s 9(c) of CNSA, to which, accused pleaded not guilty and claimed to be tried. At the trial prosecution examined PW-1 Complainant / SIP Khalilullah at Ex.3. He produced mashirnama of arrest and recovery at Ex.3/A, FIR at Ex.3/B, copy of Roznamcha entries of departure and arrival at PS at Ex.3/C and 3/D; PW-2 / ASI Abdul Karim at Ex.5; PW-3 SIP Muhammad Chungal at Ex.6, he produced chemical examiner report at Ex.6/B; PW-4 mashir / HC Abdul Razzak at Ex.7 and thereafter, prosecution side was closed at Ex.8.

5. Statement of accused were recorded u/s 342 Cr.P.C. at Ex.9 and 10. Accused denied the prosecution allegations and claimed their false implication in this case. Both accused in their statements stated that after unloading goats from Mazda at Bakra Mandi they were going to Karachi and at Pathan Colony CIA police stopped them and demanded illegal gratification and on refusal CIA police booked them in this false

case. Accused did not lead evidence in their defence and declined to give statements on oath.

6. Learned Special Judge after hearing the learned counsel for the parties and examining the evidence available on record convicted and sentenced the appellants as stated above through the impugned judgment. Hence this appeal.

Learned trial court in the impugned judgment has already discussed the evidence in detail and there is no need to repeat the same here, so as to avoid duplication and unnecessary repetition.

8. Mr. Saad Salman Ghani, learned advocate for the appellants has contended that the prosecution case is highly doubtful; the place of incident was located at busy spot, yet, none from public was joined to attest the arrest and recovery; there are material contradictions in prosecution evidence, hence it cannot be relied upon; that there was delay in sending the case property to the chemical examiner and tampering with the case property during such period could not be ruled out. It is argued that alleged recovery was made on 26.09.2013, whereas the samples were sent to the chemical analyzer on 07.10.2013 with a delay of 12 days and no evidence has been brought on the record that charas was in the safe custody during that period. He further argued that PC Jeen through whom the samples of charas were sent to chemical examiner has also not been examined. Lastly he argued that the accused have been involved in this false case due to their failure to pay illegal gratification to the police.

9. In support of his contentions, learned counsel for the appellants relied upon the cases of ***Ikramullah & others v. the State*** (2015 SCMR 1002), ***Hussain Bux v. State*** (2017 PCr.LJ 501). He also produced certified copy of the judgment passed in Cr. Case No.1023/2013, whereby both the appellants were acquitted in connected crime bearing No.166/2013, registered at Police Station Hatri, under section 3/4 PEHO.

10. Syed Meeral Shah, learned D.P.G. very fairly conceded to the contentions of learned counsel for the appellants and did not support the impugned judgment.

11. We have carefully heard the learned counsel for the parties, scanned the entire evidence and considered the relevant case law.

12. The first point to be considered in our view is that this case is an off shoot case. In essence the appellants along with 2 other absconding accused were stopped by the same PW's whilst driving a Mazda truck in which 16 blue bags containing bhang were recovered along with the alleged charas recovered from the appellants in this case. The appellants were tried separately u/Artcile 3/4 PEHO in respect of the 16 blue bags of bang and both were acquitted by the civil judge and judicial magistrate IX Hyderabad vide judgment dated 23-11-2016 mainly on account of the failure to join independent Mushirs, the delay in sending the chemical report and the lack of any proof of safe custody of the recovered substance. This Judgment has attained finality and in essence revolves around the same PW's and similar evidence as was produced before the trial court in this case.

13. Turning to this case we find the following defects in the prosecution case;

(a) that despite the spy information being received 3 hours in advance of the Mazda's arrival no effort was made to associate an independent mushir despite there being plenty of time to do so. In this respect reference may be made to the case of **Hussain Bux case (Supra)**

(b) that there are major contradictions in the evidence of the PW's (for example according to PW Khalilullah who was the complainant and who also made the arrest and recovery a black colour plastic teli was recovered from right fold shalwar of Rashid which contained one big piece and one small piece of charas weighing 1250 gms whilst on searching the Mazda under the seat of driver Saleem one big piece and one small piece of charas was recovered weighing 1500 gms. Whereas according to PW Abdul Razzak who was a mushir a black coloured shopping bag was recovered from the side pocket of Saleem containing one big piece and one small piece of charas weighing 1250 gms and a black coloured shopping

bag was also recovered under the seat of Rashid containing one big piece and one small piece of charas weighing 1500gms. This in our view is a major contradiction. Likewise the statement during cross examination that Saleem's parcel contained one big piece and 3 small pieces) It is true that minor contradictions can generally be ignored but major ones such as these cannot especially where there is no independent mushir and only police officials are involved. In this respect reference may be made to the case of **Zakir Khan & others v. The State** (1995 SCMR 1793)

(c) that according to the PW Abdul Karim who registered the FIR the time of arrival of the police party with the accused and the case property was on 27-09-2013 at about 0015. This was the same time when the FIR was registered. In our view this timing is not believable as the arrival entry had to come first and then the registration of the FIR at least 10 to 15 minutes later not at the same time. Such position further damages the credibility and reliability of the police.

(d) that there was over writing in the memo of arrest and recovery concerning its date 3 times which went completely unexplained. In this regard reference may be made to the case of **Hussain Bux case (Supra)**

(e) that the IO PW Muhammed Chagal carried out such a poor investigation that he did not even visit the place of wardat and according to his evidence during cross examination the SHO sent the samples to the chemical examiner whilst at the same time PC Jeen deposited the samples which is clearly contradictory.

(f) that there was an unexplained delay of 12 days between recovering the charas and sending it to the chemical examiner. During this period there was no evidence of where the charas was kept and whether it was kept in safe custody or not. Further PC Jeen who deposited the samples with the chemical examiner as per the Report was not examined to confirm either the safe custody or safe transit of the charas to

the chemical examiner. Thus, there was opportunity for interfering with/tampering with the sample which may alone be fatal to the prosecutions case. In this respect reliance is placed on the case of *IKRAMULLAH & OTHERS V/S. THE STATE* (2015 SCMR 1002), the relevant portion of which is reproduced below for ease of reference:-

“5. In the 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 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.”

(g) The appellants put there defense to the prosecution witnesses throughout. Namely, that the case had been foisted on them because they refused to pay illegal gratification to the police.

(h) That the appellants have already been acquitted by the trial court in the main case as mentioned above which was based on the same PW's and similar evidence.

14. Thus for all the factors mentioned in Para 13 above we find that the prosecution has completely failed to prove its case against the appellants. Even otherwise it is a well settled principle of law that the appellants are entitled to the benefit of the doubt. In this regard reference may be made to the case of *Tariq Pervez V/s. The State*

(1995 SCMR 1345), where the Honourable Supreme Court held as under:-

"It is settled law that it is not necessary that there should be 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."

15. For the above stated reasons, we hold that prosecution has failed to prove its case against the appellants, therefore, by short order dated 16.05.2017 while extending the benefit of doubt, appeal was allowed. The impugned order was set aside and both the appellants (Saleem and Rashid Mehmood) were acquitted of the charge.

16. Above are the reasons for our short order dated 16.05.2017.

Hyderabad:

Dated: _____