

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Present:-

Mr. Justice Naimatullah Phulpoto

Mr. Justice Mohammad Karim Khan Agha

Cr. Appeal No.D-94 of 2014.

Date of hearing: 16.05.2017.

Date of judgment: 16.05.2017.

Appellant Taj Muhammad @ Taju : Through Hameedullah Dahri,
@ Mumtaz Brohi : Advocate.

The State: Through Syed Meeral Shah, D.P.G.

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J: This appeal is directed against the judgment dated 16.09.2014 passed by learned Special Judge for CNS Shaheed Benazirabad, in Special Narcotic Case No.295 of 2012, arising out of Crime No.104/2012, registered at Police Station Sakrand, under section 9(c) Control of Narcotic Substances Act, 1997 (CNSA), whereby the appellant Taj Muhammad alias Taju alias Mumtaz Brohi was convicted u/s 9(c) of CNS Act, 1997 and sentenced to suffer RI for 05 years and to pay the fine of Rs.25,000/- In case of default in payment of fine he was ordered to suffer simple imprisonment for 05 month more (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 on 25.07.2012, SIP Basharat Ali of Police Station B-Section left police station alongwith his subordinate staff P.Cs. Ghulam Akbar, Ghulam Qadir, Khalid Pervaiz and Driver Zameer Hussain vide roznamcha entry No.25 for patrolling in a Government vehicle. While patrolling at various places when they

reached at Khaskheli Curve at road leading to 60-Mile, where it is alleged that police party received spy information that one person namely Taj Muhammad alias Taju alias Mumtaz, required in Crime No.102/2012 of PS: B-Section Nawabshah was selling Charas at Sim nala Mori. On such spy information, the police party proceeded to the pointed place and saw that present accused was standing at Sim Nala Mori. Accused while seeing police party, tried to run away but he was surrounded and caught hold of by the police officials. On inquiry, he disclosed his name as Taj Muhammad alias Taju alias Mumtaz S/o Amir Bux, by caste Brohi. Due to non-availability of public persons, it is alleged that P.Cs. Ghulam Akbar and Ghulam Qadir were made as mashirs and personal search of the accused was conducted. During search, three pieces of charas were secured from the possession of accused; cash of Rs.150/- was also secured. Charas was weighed it became 3000 grams, out of the aforementioned charas 100 grams from each piece were separated and sealed for chemical analysis. Mashirnama of arrest and recovery was prepared. Thereafter, accused and case property were brought at police station where F.I.R. was lodged by SIP Basharat Ali on behalf of the State under section 9(c) CNSA.

3. During investigation, Investigation Officer recorded 161 Cr.P.C. statements of the PWs. Sample of 100 grams (total 300 grams) of the substance / charas was sent to the chemical examiner for analysis on 06.08.2012 through PC Amanullah 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.5 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 Basharat Ali at Ex.7. He

produced mashirnama of arrest and recovery at Ex.7/A, FIR at Ex.7/B, photostat copy of Roznamcha entries of departure and arrival at PS: at Ex.7/C, Chemical Examiner report at Ex.7/D, PW-2 / mashir Ghulam Akbar at Ex.9 and thereafter, prosecution side was closed at Ex.8.

5. Statement of accused was recorded u/s 342 Cr.P.C.at Ex.11. Accused denied the prosecution allegations and claimed his false implication in this case. Accused did not lead evidence in defence and declined to give statement 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 appellant as stated above vide the impugned judgment. Hence this appeal.

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

8. Mr. Hameedullah Dahri, learned advocate for appellant 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 25.07.2012, whereas the sample was sent to Chemical Analyzer on 06.08.2012 with an unexplained delay of 13 days and no evidence has been brought on the record that the recovered charas was in safe custody during that period. He further argued that PC Amanullah through whom the sample of charas was sent to the Chemical Examiner has also not been examined. Lastly he argued

that the accused has been involved in this false case due to bad relations which he and others from his village had with DSP Aijaz Memon in order to teach him a lesson. In support of his contentions, learned counsel for the appellant relied upon the case of **IKRAMULLAH & OTHERS V/S. THE STATE** (2015 SCMR 1002).

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

10. We have carefully heard Mr. Hameedullah Dahri, learned advocate for appellant, Syed Meeral Shah, learned D.P.G. for the State, scanned the entire evidence and considered the relevant law.

11. We have reached the conclusion that the prosecution has failed to establish its case for the reasons that it was case of spy information. According to the spy information, accused was selling charas near Sim Nala Mori, 60-Mile road, and police arrested the accused from the said place, but no private person from the aforementioned Mori was associated to act as mashir of arrest and recovery despite them being available and the arrest being made near a busy road and based on the particular facts and circumstances of the case we consider that such independent mashirs were required in order to give greater credibility to the police version of events which we consider to be highly doubtful in the absence of such independent corroboration. More significantly according to the prosecution case, charas was recovered on 25.07.2012 and sample was sent to the Chemical Examiner on 06.08.2012. This was an unexplained delay of 12 days and nothing has come on record to show that the recovered Charas was in safe custody during that period. Furthermore, PC Amanullah, who has taken the sample for Chemical Examination has also not been examined by the

prosecution in respect of the charas' safe custody or safe transit as such there is likelihood that such sample may have been tampered with /interfered with and as such the result of the chemical examiner cannot be safely relied upon. 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 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. In our view this alone is a major defect in the prosecutions case which would justify the acquittal of the appellant. We have also observed that there are contradictions in the evidence of the PW's (for example PW 1 states that Ghulam Qadir separated the charas and weighed the charas where as PW 2 states that PW 1 separated the charas and weighed the charas) and nobody was seen approaching the appellant for purchasing anything which would tend to suggest that he was not selling drugs to anyone. Convictions in narcotics cases under the CNSA entail heavy sentences including capital punishment thus in such circumstances the courts have to view the evidence with extra care and caution.

13. It also a well settled legal proposition that in any criminal case the prosecution has to prove its case beyond a reasonable doubt and any doubt must go the accused as of right not by way of concession. In this respect reliance is placed on 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 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. Thus, for the above stated reasons, we find that the prosecution has failed to prove its case against the appellant beyond a reasonable doubt, and therefore, by short order dated 16.05.2017 while extending the benefit of doubt to the appellant the appeal was allowed and the conviction and sentence recorded by the trial court against the appellant were set aside and the appellant was acquitted of the charge.

15. Above are the reasons for short order dated 16.05.2017.

Hyderabad:

Dated: