

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

Before:

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

Cr. Appeal No.D-136 of 2010

Umed Ali Khoso

Versus.

The State.

Appellant : Umed Ali Khoso (presently on bail)	Through Mr. Muhammad Jameel Ahmed, Advocate.
Respondent : The State	Through Syed Meeral Shah Bukhari, Additional Prosecutor General.
Date of hearing	18.05.2017.
Date of judgment	18.05.2017.

**J U D G M E N T**

**MOHAMMAD KARIM KHAN AGHA, J.-** This appeal is directed against the judgment dated 13.04.2010 passed by learned Sessions Judge / Special Judge for CNS, Mirpurkhas, in Special Case No.25 of 2007, arising out of Crime No.09/2007, registered at Police Station Divisional Special Squad (Excise) Hyderabad Region, under section 9(c) of Control of Narcotic Substances Act, 1997 (CNSA) whereby the appellant Umed Ali was convicted u/s 9(c) of CNSA and sentenced to suffer RI for 03 years and to pay the fine of Rs.10,000/-. In case of default in payment of fine he was ordered to suffer simple imprisonment for 01 month 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 present accused was arrested on 10.05.2007 at 1700 hours at Kot



Ghulam Muhammad Town, Patri of Jamshoro canal, by a police party headed by Excise Inspector Jawaid Karim alongwith his subordinate staff which amongst others included AETO Abdul Jabbar Ghangro. Accused Umed Ali was said to be found possessing five packets containing 05 Kgs of charas. Out of which 10 grams from each packet was separated for sending the same to the chemical examiner for analysis and report. 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 complainant Inspector Jawaid Karim on behalf of the State under section 9(c) CNSA.

3. During investigation, Investigating Officer recorded 161 Cr.P.C. statements of the PWs. Sample of the substance / charas was sent to the chemical examiner on 11.05.2007 through ED Allah Warayo 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 the charge against the accused at Ex.2 u/s 9(c) of CNS Act, 1997, to which, accused pleaded not guilty and claimed to be tried vide his plea at Ex.3. At the trial prosecution examined PW-1 Excise Jamadar Sikandar Ali at Ex.4, who produced the mashirnama of arrest and recovery at Ex.4/A; PW-2; EI Javed Karim at Ex.5, who produced the attested copy of roznamcha entries No.4 and 5, FIR and report of the chemical examiner at Ex.5/A to 5/C and thereafter, prosecution side was closed at Ex.6.

5. Statement of accused was recorded u/s 342 Cr.P.C. at Ex.7. The accused denied the prosecution allegations and claimed his false implication in this case. The accused produced newspaper cuttings from daily Ibrat, daily Sham and daily Kainat as annexures A to C in support of his contentions. The accused also examined himself on Oath u/s 340 (2) Cr.P.C. at Ex.8, and also he examined DWs Abdul Rasheed at Ex.9, Ali Hassan at Ex.10 and Sawan at Ex.11 in his defence and closed defence side vide Ex.12.



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 through the impugned judgment. Hence this appeal.

7. 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. Muhammad Jameel Ahmed, learned advocate for the appellant has contended that 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 10.05.2007, whereas the sample was sent to Chemical Analyzer on 11.05.2007 with a delay of 01 day and no evidence has been brought on the record that charas was in the safe custody during that period. He further argued that ED Allah Warayo through whom the sample of charas was sent to Chemical Examiner has also not been examined. Lastly argued that accused has been involved in this false case due to political rivalry. In support of his contentions, learned counsel for the appellant relied upon the cases of **Ikramullah & others v. the State** (2015 SCMR 1002), **Mian Muhammed Arshad V State** (P.Cr.LJ 865).

9. Syed Meeral Shah, learned Additional Prosecutor General Sindhi very fairly conceded to the contentions of learned counsel for the appellant and did not support the impugned judgment.

10. We have carefully considered the contentions of Mr. Muhammad Jameel Ahmed, learned advocate for appellant, Syed Meeral Shah, learned Additional Prosecutor General Sind for the State, scanned the entire evidence and considered the relevant law.

11. We have come to the conclusion that prosecution has failed to establish its case for the reasons that it was case of spy information and the police had plenty of time to call independent mushirs in this



thickly populated area which they completely failed to do despite having plenty of time to do so which would have given much greater credibility to their case; the time of the arrival entry and the FIR are the same which is not believable as there ought to be at least a 10-15 minutes gap in arriving and registering the FIR; there is also overwriting in entry No.5 which has not been explained; prima facie the malafide of the police is also shown by the fact that according to the evidence of PW Javed Karim (who was the police officer who prepared the memo of arrest and recovery) the accused told him that he purchased the narcotics from Muhammed Khoso for selling but Muhammed Khoso's statement was not recorded by the police; the recovery was doubtful as in one packet there was one big piece and 3 small pieces yet no part of the small pieces were sent for chemical analysis; the accused maintained his defense throughout trial including during his cross examination, his S.342 statement and evidence on oath and through 3 DW's that this was a false and foisted case on him for political reasons and that he had been arrested from his Mohalla on 09-05-2007 (i.e the day before his arrest was shown in the FIR) and that nothing had been recovered from him.

12. More significantly there was no evidence that the recovered narcotics were kept in safe custody between 10 and 11<sup>th</sup> May 2007 when the recovered narcotics were taken by ED Allah Warayo to the chemical examiner. No malkhana entry was produced, the keeper of the malkhana was not examined nor was ED Allah Warayo concerning the safe custody and safe transit of the chemical which could have been interfered with after its recovery and thus the chemical report cannot in our view 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 hereunder:-

*"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."*

13. In view of the above, we have no hesitation in holding that in this case based on the reasons mentioned above the prosecution has failed to prove its case against the appellant beyond a reasonable doubt. There are several circumstances which create doubt in the prosecution case. In the case of **Tariq Pervez V/s. The State** (1995 SCMR 1345), the Honourable Supreme Court 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."***

14. Thus, for the above stated reasons, we hold that the prosecution has failed to prove its case against the appellant, therefore, while extending the benefit of doubt, appeal is allowed. The impugned judgment is set aside and the appellant is acquitted of the charge. Appellant is present on bail. His bail bond stands cancelled and surety is hereby discharged.

15. These are the reasons for our short order of even date

Hyderabad:

Dated: 13/5/17