

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

Before:

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

Cr. Jail Appeal No.D-56 of 2015.

Sikandar alias Siku

Versus.

The State.

Appellant : Sikander alias Siku Unar (present on bail)	Through Mr. Ghulam Sajjad Gopang, Advocate
Respondent : The State	Through Syed Meeral Shah, Additional Prosecutor General
Date of hearing	31.05.2017.
Date of judgment	31.05.2017.

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- This appeal is directed against the judgment dated 03.02.2015 passed by learned Special Judge for CNS, Shaheed Benazirabad, in Special Case No.03 of 2014, arising out of Crime No.259 of 2013, registered at Police Station(PS) Kazi Ahmed, under section 9(c) of Control of Narcotic Substances Act, 1997 (CNSA), whereby the appellant Sikander alias Siku has been convicted u/s 9(c)CNSA and sentenced to suffer RI for 04 years and 06 months and to pay the fine of Rs.20,000/-. In case of default in payment of fine he was 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 are that on 17.12.2013 at 1630 hours, police party headed by SIP/SHO Haji Muhammad Juman Khokhar of PS Kazi Ahmed during patrolling when reached at Link

Road Faqir Rasool Bux saw the accused coming from Padd road towards City having one shopper in his hand who on seeing the police party tried to slip away but he was encircled and apprehended. Police secured 1650 grams of contraband item from his possession. Out of the said contraband item 200 grams were separated for chemical analysis. Thereafter, the contraband item and its sample, as stated above were sealed separately and memo of arrest and recovery was prepared on the spot in presence of mashirs. Thereafter the accused and case property were brought at the police station where F.I.R. was lodged by complainant SIP/Haji Muhammad Juman Khokhar 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 recovered substance was sent to the chemical examiner on 31.12.2013 through PC Muhammad Juman and positive chemical report of the said contraband / sample 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)CNSA, to which, accused pleaded not guilty and claimed to be tried vide his plea at Ex.6. At the trial prosecution examined PW-1 complainant SIP/SHO Muhammad Juman Khokhar at Ex.8, who produced mashirnama of arrest and recovery at Ex.8-A, F.I.R. at Ex.8-B, simple attested copy of roznamcha entries of departure and arrival at Ex.8-C- and 8-D, Chemical report at Ex.8-E; PW-2 ASI Syed Laique Hyder Shah, mashir at Ex.9 and thereafter, prosecution side was closed at Ex.10.

5. Statement of accused was recorded u/s 342 Cr.P.C. at Ex.11. The accused denied the prosecution allegations and claimed his false implication in this case. He further stated that charas has been foisted upon him. He was arrested on 16.12.2013 at 4-00 p.m. from the hotel and then detained illegally at P.S and on the next day he was falsely implicated in the present case. The accused neither examined himself on oath nor led any evidence in defence in order to disprove the prosecution case.

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. Ghulam Sajjad Gopang, learned advocate for appellant has contended that prosecution case is highly doubtful; that this is a thickly populated area yet none from public was joined as mashir to attest the arrest and recovery; there are material contradictions in prosecution evidence; that as per prosecution case the sample was sent for Chemical analysis on 31.12.2013 through PC Muhammad Juman with a delay of 14 days, hence tampering with the case property during such period could not be ruled out. He further argued that PC Muhammad Juman through whom the sample was sent to chemical examiner, has also not been examined. Lastly argued that accused has been involved in this case falsely.

9. Syed Meeral Shah, learned Additional Prosecutor General Sindh 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 the learned counsel for the parties, scanned the entire evidence and considered the relevant law.

11. We have come to the conclusion that the prosecution has failed to prove its case for the following reasons; that the alleged arrest and recovery was made in a busy area during daylight hours yet the police officials made no serious efforts to associate any independent mashir, which would have given more credibility to their version of events; that the accused was allegedly selling charas but no purchaser was arrested and no fake purchaser was sent to the appellant who could have been a compelling witness regarding the appellant selling charas; that there has been contradictions in the prosecution evidence. For example, P.W. Haji Muhammad Juman states that there were two

pieces of charas and that they were of the same size when they were recovered and that they were black in colour, likewise PW Laique Hyder; however, when the pieces were desealed and placed before the trial Court their size was found to be different and of a different colour; that there is also overwriting on the mashirnama which casts further doubt on the prosecution case; that there have been 14 days' unexplained delay in sending the charas for chemical examination from the date of its recovery;

12. Most significantly, that there is no evidence that the charas was kept in safe custody from the time when it was recovered until the time when it was sent for chemical examination; that the roznamcha entry noting the recovery nowhere mentions where the said charas was kept during the said period; although PW Muhammed Juman states that he handed over the sample to the WHC for keeping in the malkhana there is no evidence that the recovered charas was placed in the malkhana; that no such malkhana entry has been produced and the Incharge of the malkhana has not been examined. Furthermore, PC Juman who had taken the narcotic sample for chemical examination has also not been examined as to its safe custody and safe transit to the chemical examiner.

13. Under these circumstances, we find that the sample of the alleged recovered narcotic was not kept in safe custody from the time of its recovery until it was transmitted to the chemical examiner and as such there is a possibility that the sample may have been interfered with / tampered with during the period in which it was recovered and sent to the Chemical Examiner. Thus, in view of these circumstances, even if, the chemical report is proved positive it is of no assistance to the prosecution. In the case of **Ikramullah & others V/S. The State** (2015 SCMR 1002), the importance of keeping the recovered narcotic substance in safe custody and proving its safe transit to the chemical examiner was emphasized in the following terms:-

"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."

14. In view of the above, we have no hesitation to hold that in this case the prosecution has failed to prove its case against the appellant. 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."

15. For the above stated reasons, we hold that prosecution has failed to prove its case against the appellant, therefore, while extending the benefit of doubt, appeal was allowed by short order dated 31.05.2017 and the conviction and sentence recorded by the trial Court were set aside and appellant was acquitted of the charge.

16. Above are the reasons for our short order of even date.

Hyderabad:

Dated:31.05.2017.