

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No. 613 of 2022

Present Before:

Justice Zafar Ahmed Rajput

Justice Tasneem Sultana

Appellant : Qahir s/o Muhammad Alam, through
Mr. Gharib Shah, advocate.

Respondent : The State, through Mr. Mumtaz Ali Shah,
Assistant Prosecutor General (APG), Sindh.

Date of hearing : 27.03.2025

Date of Judgment : 27.03.2025

J U D G M E N T

TASNEEM SULTANA, J. Through this Criminal Appeal, appellant, Qahir son of Muhammad Alam has assailed the judgment, dated 25.07.2022, passed by the learned IVth Additional Sessions Judge/Model Criminal Trial Court-Extension, Karachi-South in Special Case No. 2421 of 2020, arisen out of F.I.R. No. 302 of 2020, registered at P.S Kalri, Karachi, under sections 6/9-(c) of the Control of Narcotic Substances Act, 1997 (“**Act of 1997**”), whereby he was convicted under Section 265-H(ii), Cr.P.C and sentenced to suffer R.I. for life with fine of Rs. 100,000/- (Rupees One Hundred Thousand only), in case default thereof, he should suffer S.I. for six (06) months more. He was; however extended benefit of section 382(b), Cr.P.C.

2. It is alleged that, on 26.08.2020 at 1100 hours, police party of P.S. Kalri headed by ASI Ali Sher arrested the appellant at main Maripur Road, near Wazir Mention Railway Station, Kalri, Lyari, Karachi on being found in possession of 16 packets of charas, weighing total 19 kilograms, under a memo of arrest and recovery prepared in presence of mashirs PC Mumtaz and PC Sajjad; for that he was booked in the aforesaid FIR.

3. After usual investigation, police submitted the charge-sheet against the appellant. Having been supplied requisite documents as provided under section 265-C, Cr. P.C., the Trial Court framed a formal charge against the accused, to which he pleaded not guilty and claimed to be tried.

4. To prove its case, prosecution examined four witnesses. **PW-1** ASI Ali Sher, complainant, examined at Ex.3, who produced departure entry, memo of arrest and recovery, FIR, arrival entry and memo of place of incident at Ex. 3/A to 3/E respectively; **PW-2**, PC Mumtaz Ali, mashir, examined at Ex.4; **PW-3**, HC Tariq Aziz, head mohrar, examined at Ex.5, who produced original Malkhana Register No. 19-Book No. 2270, bearing entry No. 302/2020, dated 26.08.2020, and produced its attested copy at Ex. 5/A and **PW-4**, SIP Hameedullah Khan Niazi, I.O., examined at Ex.6, who produced departure entry No.19, site sketch, arrival entry No.21, departure entry No.6 dated 27.08.2020, arrival entry No. 18, CRO report, letter to Chemical Examiner and his report at Ex. 6 to 6/H respectively.

5. The statement of appellant under section 342, Cr. P.C. was recorded at Ex. 8, wherein he denied the allegations against him and claimed to be innocent. He deposed that he was illegally taken into custody on 22.08.2020 by the police personnel in civil dress, who kept him at PS Nazimabad for two days, wherefrom he was shifted to some unknown place and then his custody was handed over to PS Kalri, where he was falsely implicated in this case by foisting charas upon him. He, however, neither examined himself on oath to disprove prosecution's allegations, nor even led any evidence in his defence. The Trial Court after hearing the learning counsel for the appellant as well as DDPP for the State convicted the appellant and sentenced him as mentioned above, vide impugned judgment.

6. We have heard the learned counsel for the appellant and APG, Sindh and scanned the material available on record with their assistance.

7. Learned counsel for the appellant has *inter alia* contended that the prosecution has failed to prove the recovery of alleged narcotic drug, yet the Trial Court recorded conviction assigning the reasons, which are contrary to the evidence available on record; that there are material contradictions in the statement of the witnesses, which have made the recovery of alleged narcotic drug highly doubtful, but the Trial Court failed to appreciate such aspect of the case; that prosecution has failed to prove safe custody of the case property and its safe transmission to Chemical Examiner; that the Chemical Examiner has not observed the protocols for conducting test; as such, his report is not in accordance with the guidelines enunciated by the Apex Court in number of cases, and the Trial Court by over sighting the above important aspects of the case has erred in law by holding the appellant guilty of the offence on the basis of defective report of Chemical Examiner; that the alleged recovery of charas from the possession of the appellant is doubtful and despite prior information, the complainant failed to associate any private person to witness search and recovery; the benefit thereof should be extended to him; hence, the impugned Judgment is liable to be set aside.

8. Conversely, learned APG while supporting the impugned Judgment has maintained that the prosecution has proved its case against the appellant beyond any doubt; that prosecution has produced evidence to establish safe custody and safe transmission of the case property; that the Chemical Examiner has observed the requisite protocol in examination of case property; that the impugned Judgment is based on proper appreciation of evidence on record.

9. It appears from the statements of PWs that, on 26.08.2020, near Wazir Mention Railway Station, Karachi, police party on secret information apprehended the appellant and recovered one orange plastic bag, containing 16 packets of charas, weighing 19 Kilograms, from his possession. In this regard, the prosecution based its case on the testimony of ocular account furnished by PW-1 ASI Ali Sher (Ex.03) and PW-2 PC Mumtaz Ali (Ex.04), who arrested the appellant red handed along with alleged narcotic drug, which was taken into possession vide recovery memo (Ex.3-B). Both the PWs were put at lengthy cross-examination but they remained firm to their depositions and nothing came out to suggest that the appellant was falsely implicated by them or they have any animosity with him.

10. On reassessment of evidence of PWs, it is observed that prosecution had taken all required necessary steps to ensure the safe custody of the recovered material, which ultimately through report of Chemical Examiner (Ex.6-H) was confirmed as charas. The recovered charas was sealed at the spot, handed over to PW-3 HC Tariq Aziz, Head Mohrar (Ex.05), who incorporated this fact in Register No. 19 (Ex.5-H) and kept the contraband in the Malkhana. He has affirmed the fact of safe custody of the case property before Trial Court as well. PW-4, I.O. SIP Hameedullah Khan Niazi (Ex.06) delivered the sealed parcel to the office of Chemical Examiner and he himself received the FSL report (Ex.6-H) from the Office of Chemical Examiner. He was also cross-examined by the defence counsel but nothing came on record to challenge the safe transmission of the case property to the Chemical Examiner. Hence, the evidence of P.Ws. has remained un-shattered on the points of arrest and recovery of charas from appellant and its safe custody in Malkhana and safe transmission to the office of Chemical Examiner.

11. In the instant case, the recovery of charas having been proved, the burden shifted to the appellant to prove that he was innocent. Although, in the cross-examination of P.Ws., the appellant strived to toss the plea of his false implication by suggesting that police illegally took him from his work place i.e. Masha Allah Hotel, situated at Naya Nazimabad No.2, Karachi, but he failed to substantiate it either by avowing in his statement recorded under section 342, Cr.P.C. or by affirming it on oath by him or producing defence witness(es) in support of his claim of being arrested from his alleged work place. It is a settled proposition that primary obligation of the prosecution is to prove its case beyond reasonable doubt and its burden shifts under the presumption contained in section 29 of the Act of 1997. In the instant case, once the prosecution established recovery of charas beyond shadow of doubt, the burden has shifted to appellant to prove his innocence, but he has failed to do so.

12. As regards the contention of learned counsel for the appellant regarding non-association of a private witness is concerned, section 103, Cr.P.C. is excluded for the offences falling under the Act of 1997 by virtue of Section 25 of the Act. In this respect, reliance is placed on the case of Abdul Rasheed vs. The State (2009 SCMR 306) wherein the Apex Court has observed as under: -

"So far as the arguments regarding non-association of public witness at the time of raid by the raiding party is concerned, suffice it to observe that application of provision of Section 103, Cr.P.C. has been excluded under section 25 of the Act, as laid down by this Court in Fida Jan vs. The State (2001 SCMR 36). The prosecution witness being member of party were the natural witness and their testimony cannot be discarded merely on the ground that they were the employees of the police force.

Reference in this context may be made to Muhammad Azeem vs. the State (PLD 1996 SC 67); Muhammad Hanif vs. The State (2003 SCMR 1237); Riaz Ahmed vs. The State (2004 SCMR 988); and Naseer Ahmed vs. The State (2004 SCMR 1361)."

13. As regards the next contention of learned counsel for the appellant regarding applying of protocols by the Chemical Examiner, it may be observed that Rule 6 of the Control of Narcotics Substances (Government Analysts) Rules, 2001 requires reference to the protocols applied for the test or analysis as per Form-II. We have scanned the Chemical Examiner's report (Ex.6/H) and are of the opinion that the same significantly meets the rudiments of Rule 6 and Form-II. It reflects from perusal of the Ex.6/H that it bears reference of letter through which sample was deposited, date of receiving sample, name of official who deposited the sample, the condition of the seals on the packet, description of article in the parcel, gross and net weight of charas, physical examination, fast blue B salt test, TLC test, and the result of the examination. It further appears that the Chemical Examiner has followed the analysis protocols which are in line with the United Nations Office on Drug and Crime (UNODC) Guidelines of 2009. We are, therefore, of the view that the Chemical Examiner's report qualifies to meet the required standards and it is in consonance with Form-II referred to in Rule 6 (ibid). In the case of Shafaullah Khan vs. The State (2021 SCMR 2005), the Apex Court has held that the report of Chemical Analysis must contain (i) the test applied (ii) the protocols applied to carry out tests (iii) the result of the tests. Ex.6/H bears aforesaid all three requisites. Hence, the contention of learned counsel for the appellant is contrary to record.

14. In view of the above discussed facts and circumstances of the case, we have found that the prosecution has proved its case against the appellant

beyond any reasonable doubt by producing reliable, trustworthy and confidence inspiring evidence in shape of ocular and documentary evidence corroborated by the report of Chemical Examiner. Therefore, the impugned judgment does not suffer from any illegality or infirmity calling for interference of this Court in its appellate jurisdiction. Consequently, instant appeal is dismissed by maintaining the conviction and sentence awarded to appellant.

15. These are the detailed reasons of our short order dated 27.03.2025.

J U D G E

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Faheem/PA