# IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Special Cr. Appeal No. D-41 of 2024

***BEFORE:***
*Mr. Justice Amjad Ali Bohio, J.*
*Mr. Justice Khalid Hussain Shahani, J.*

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| Appellants | : | 1. Akbar Hussain S/o Sardar Akbar, Afridi<br>2. Sirajuddin S/o Sawab Gul by caste Afridi,<br>*Through* Mr. Saifullah Afridi, Advocate |
| The State | : | Through Mr. Shafi Muhammad Mahar, DPG |
| Date of hearing | : | 16.12.2025 |
| Date of Judgment | : | 24.12.2025 |

## J U D G M E N T

***KHALID HUSSAIN SHAHANI, J. –*** Through this criminal appeal, the appellants Akbar Hussain and Sirajuddin assail the judgment dated 23.02.2024 passed by the learned IIIrd Additional Sessions Judge/MCTC-II/Special Judge (CNS), Sukkur in Special Case No.53 of 2023, whereby they were convicted under Section 9(3) (e) of the Control of Narcotic Substances Act, 1997 and sentenced to imprisonment for life with a fine of Rs. 800,000/- each, and in default to suffer simple imprisonment for one year.

2. The prosecution case, as set out in FIR No.01 of 2023 registered on 01.01.2023 at 11:30 p.m at Excise Police Station Rohri Circle, is that on the same day at about 04:00 p.m., Excise Inspector Qamardin Siyal, accompanied by his staff Excise Deputy Hubdar Ali and Excise Constables Moula Bux, Zubair Ahmed, Imran Khan, Niaz Hussain and Huzoor Bux left the police station under roznamcha entry No. 01 in official vehicle GSB-531 for patrol and checking of narcotics offences and reached the Excise Check Post near Arore University on National Highway, Rohri. At about 6:30 p.m., an 18-wheeler oil tanker bearing registration No. C-9176 (Kohat), driven by one person with another seated beside him, arrived from the Punjab side and

was signalled to stop. The driver disclosed his name as Akbar Hussain S/o Sardar Akbar Afridi, resident of Dara Adam Khail, District Peshawar, and claimed that the tanker was empty, while the person seated beside him introduced himself as Sirajuddin S/o Sawab Gul Afridi, resident of Matni, District Peshawar, and stated that he was the cleaner of the tanker.

3. According to the prosecution, as no private persons were allegedly available, Excise Constables Moula Bux and Zubair Ahmed were appointed as mashirs, and after apprising the accused of departmental formalities, their personal search and the search of the tanker were carried out in their presence. From Akbar Hussain's personal search, cash of Rs. 3,100/-, an original CNIC, an original driving licence and a Nokia keypad mobile phone with SIM were recovered, while from Sirajuddin, cash of Rs. 400/- and an original CNIC were allegedly secured. On searching the tanker, a wooden cavity was allegedly found behind the driver's seat containing 100 colourful plastic packets; each packet, on being opened, contained two slabs of *charas*, and each packet was found to weigh one kilogram on a computerized scale, making a total of 100 kilograms. From each packet, 500 grams were separated, wrapped and sealed as 100 samples for chemical analysis with the signatures of the Excise Inspector and both mashirs, while the remaining slabs were sealed in two plastic sacks containing 50 packets each, also bearing their signatures.

4. During further search, the original registration book was recovered from the switch board of the tanker, showing the owner as Saleem Nawaz S/o Saeed Ghani, resident of Kohat, and reflecting the particulars of the vehicle as Model 2011, Engine No. FE6123372CP, Chassis No. CDA411P-00741 and Registration No. C-9176 (Kohat). On further questioning, both accused allegedly disclosed that one Zeenat Ali S/o Ali

Janan, resident of Attock, was the owner of the charas and had handed over the contraband to them for onward delivery at a place to be intimated later. A memo of arrest and recovery was prepared on the spot, read over to the mashirs, who allegedly acknowledged its correctness and signed it along with the Excise Inspector. The accused and case property were then taken to the Excise Police Station Rohri Circle, where arrival entry No. 02 was made at 11:20 p.m., followed by lodging of the FIR at 11:30 p.m., and the case property was deposited in the Malkhana vide entry No.09 of Register No.19.

5. Upon completion of investigation, Excise Inspector Qamardin Siyal submitted a challan before the learned Judicial Magistrate-I, Rohri, showing Akbar Hussain and Sirajuddin in judicial custody and placing accused Zeenat Ali and Saleem Nawaz in column of absconders. The learned Magistrate, after completing necessary formalities, declaring the absconding accused as proclaimed offenders and supplying requisite documents to the present appellants under Section 241-A, Cr.P.C. at Exh. 04, transmitted the case to the Court of learned Sessions Judge/Special Judge (CNS), Sukkur, from where it was made over to the trial Court for disposal in accordance with law.

6. The learned trial Court framed a formal charge against both appellants at Exh. 05, to which they pleaded not guilty and claimed trial. In support of the charge, the prosecution examined PW-01 Excise Inspector Qamardin Siyal at Exh. 06, who produced departure and arrival entries, the memo of arrest and recovery, FIR, Malkhana Register entry, road certificate, relevant correspondence with Motor Registration Authority Kohat and District Police Officer Attock, and the Chemical Examiner's report as Exh. 06/A to 06/L. PW-02 Excise Constable Moula Bux Bhutto was examined at Exh. 07, who broadly supported PW-01; thereafter, the learned DPP for the State closed the prosecution evidence vide Exh. 08.

7. The statements of both appellants under Section 342, Cr.P.C. were recorded at Exh. 09 and 10 on 26.08.2023, wherein they denied the allegations, asserted their innocence and alleged that charas had been planted upon them and the documents fabricated by excise officials. Appellant Akbar Hussain stated that on 30.12.2022 at about 12:30 p.m. he had parked his oil tanker at Qutubdin Rest Area on N-5 Motorway for lunch and prayers when a car containing excise officials arrived and inquired about Saleem Nawaz, whereupon he informed that one Noor Rehman had purchased the tanker from Saleem Nawaz; he alleged that he was then taken towards Sadiqabad, unlawfully confined for two days at a school and subsequently implicated in the present case, and sought restoration of Rs. 45,000/-, his CNIC, driving licence, mobile phone with SIM and the tanker, allegedly seized illegally. Appellant Sirajuddin stated that the same day at about 3:00 p.m. he, with his friends Younis and Ayaz, while travelling from Peshawar to Karachi in a car No. 024, had stopped at Qutubdin Rest Area and, on emerging from the washroom, was apprehended by 3 or 4 excise officials, taken towards Punjab, kept in unlawful confinement for two days at a school, and later came to know in jail that Excise Police Ghotki had lodged a false FIR against his two friends and shown their car as case property; he also prayed for return of his cash and CNIC. Both appellants subsequently examined themselves on oath at Exh. 11 and 12 and produced two defence witnesses, Muhammad Sudheer and Haq Nawaz, at Exh. 13 and 14, whereafter the defence evidence was closed at Exh. 15.

8. After hearing both sides and appraising the material on record, the learned trial Court convicted and sentenced the appellants as mentioned in the opening paragraph of the judgment, vide judgment dated 23.02.2024, which has been impugned through the present appeal.

9. Learned counsel for the appellants argued that the impugned judgment is vitiated by misreading and non-reading of evidence and that the prosecution case is riddled with material contradictions and physical impossibilities. He contended that the alleged wooden cavity behind the driver's seat could not, in fact, contain 100 kilograms of charas, which assertion is reinforced by the production of only 88 kilograms before the trial Court, leaving an unexplained shortfall of 12 kilograms that fatally undermines the prosecution's plea of safe custody and chain of custody. He further submitted that tracker records established that the appellants were apprehended on 30.12.2022 at Qutubdin Rest Area and illegally confined thereafter, contrary to the FIR version of arrest on 01.01.2023, and that the trial Court, by delaying and ultimately dismissing applications for summoning CCTV footage and official tracker data, denied the appellants a fair trial. Learned counsel put stance that copy of register *XIX* produced as Exhibit No. 6/E is silent about time of dipositing contraband and its dispatch for chemical analysis; besides, road certificate produced as Exhibit 6/F shows to be issued on 01.01.2023 and chemical report produced is suggestive of the fact that sample was received at chemical laboratory on 02.01.2023 and no explaination in this respect furnished by the prosecution, where the sample remained for a day, hence safe custody and its safe transmission to chemical lab has been compromised. He also urged that the author of the memo of arrest and recovery as well as 161 Cr.P.C statements of the Prosecution witnesses namely ED Hubdar Ali has not been examined, which is fatal for the prosecution narrative. He also emphasized that, despite an alleged recovery on a busy highway during daylight, no independent witness was joined, no videography was undertaken in the teeth of Supreme Court guidance, and that the complainant himself acted as Investigating Officer

without independent corroboration, thereby necessitating extension of benefit of doubt.

10. Conversely, learned DPG for the State supported the conviction, maintaining that the prosecution had proved its case beyond reasonable doubt on the basis of consistent and confidence-inspiring official testimony, which, under the CNSA, is as competent as that of private witnesses. He argued that the recovery of a large commercial quantity of 100 kilograms of charas from a secret cavity of the vehicle driven by appellant Akbar Hussain stood corroborated by the Chemical Examiner's positive report, that the defence had failed to prove the authenticity of the tracker record through any company official, and that minor discrepancies in the defence evidence rendered it unreliable. He further submitted that there is no legal embargo on the complainant acting as Investigating Officer or Malkhana incharge and, considering the grave societal impact of narcotics trafficking, the appellants merited no leniency.

11. We have heard learned counsel for the appellants and learned Deputy DPG for the State at length and have examined the record, including the impugned judgment, depositions of prosecution and defence witnesses, documentary exhibits and the tracker record produced by the defence, as well as the case law relied upon by both sides.

12. Before adverting to the factual appreciation, it is pertinent to note that the Control of Narcotic Substances Act, 1997 was enacted to consolidate and amend the law relating to narcotic drugs, psychotropic and controlled substances and matters connected therewith or ancillary thereto, as is evident from its preamble. Section 9 of the Act prescribes prohibitions and penalties relating to possession, trafficking and financing of trafficking of such substances; sub-section (3)(e) thereof provides for imprisonment for life and

fine up to one million rupees where the quantity involved is ten kilograms or more. In the present case, the appellants were charged with trafficking 100 kilograms of charas, a clearly commercial quantity, on the basis of which the trial Court imposed the maximum sentence.

13. The jurisprudence under the CNSA consistently holds that, given the severity of the punishments prescribed including life imprisonment and, in some situations, death, the prosecution evidence must be subjected to strict scrutiny, and any reasonable doubt must redound to the benefit of the accused. In Ismaeel v. The State (2010 SCMR 27), the Hon'ble Supreme Court reiterated that, although the nature of evidence in narcotics cases may differ from ordinary criminal trials, the prosecution's burden to prove the charge beyond reasonable doubt remains undiminished, and where two possible views emerge from the evidence, the one favourable to the accused must prevail, a principle rooted both in Islamic jurisprudence and the common law tradition consistently applied by the superior courts.

14. In the present case, the prosecution case rests entirely on the testimony of two witnesses: PW-01 Excise Inspector Qamardin Siyal, who is the complainant, Investigating Officer, Malkhana incharge and also a witness to the alleged recovery, and PW-02 Excise Constable Moula Bux, who was appointed as one of the two mashirs due to the alleged non-availability of private persons at the spot. The other mashir, Excise Constable Zubair Ahmed, was not examined, and no explanation was offered for his non-examination. The prosecution had listed seven witnesses in the challan but examined only two and abandoned the remaining five without any justification, a circumstance that materially weakens the prosecution case and raises serious doubt about the reasons for not examining those who were allegedly present at the scene.

15. PW-01, in his examination-in-chief, merely reiterated the facts stated in the FIR, but in cross-examination, he admitted that no other vehicle was checked before the arrival of the oil tanker, that the place of incident is the busiest road, that he did not record the currency numbers of the notes recovered from the appellants in the memo of arrest and recovery or in the FIR, that he does not know whether the wooden cavity is available in every oil tanker, that he does not remember whether other small cavities existed in the main cavity, that he himself opened the wooden cavity, that the weighing of charas was done with the help of battery-operated lights, that no excise official was giving signals to other vehicles passing through the check post at the time of weighing, that he does not remember the exact date of his visit to Khyber Pakhtunkhwa for investigation, that he does not recall how many excise officials accompanied him, that he did not measure the size of the wooden cavity in length, width and height, and that he did not produce the appellants before the learned Judicial Magistrate for recording confessional statements under Section 164, Cr.P.C. He denied the suggestion that Akbar Hussain was arrested from a hotel at Qutubdin Rest Area and Sirajuddin from the washroom there on 30.12.2022, and also denied that Excise Constable Huzoor Bux had driven the tanker from Qutubdin Rest Area to Public School Obaro, as per the tracker record.

16. PW-02, Excise Constable Moula Bux, generally corroborated PW-01, but in cross-examination, admitted that his duty timings are 12 hours and sometimes extend to 24 hours, that it was darkness of night when the incident occurred, that the oil tanker was from another province and therefore treated as suspicious, that the wooden cavity is not available in every oil tanker but only in some vehicles, that no other item was found in the cavity except charas packets, that he does not know the exact size of the

cavity in width, length and height, that he could not name the offices to which letters were sent for investigation or the courier service used, that two speakers are installed in the wooden cavity, that he could not state the length of the cavity as four and a half feet and depth as eight inches, that no lock is installed in the cavity, that one corner of the cavity touches the driver's seat and the other the front seat, and that the cavity is like a tool box.

17. After a careful scrutiny of the prosecution evidence, several material circumstances emerge which cast serious doubt on the veracity of the prosecution case. *First*, the alleged recovery took place at the Excise Check Post near Arore University on National Highway, admittedly the busiest road, yet no private person was associated as a witness. PW-01 merely stated that, due to non-availability of private persons, he appointed two excise constables as mashirs, but he did not explain what efforts were made to locate private persons or why, at a busy check post on a national highway at 6:30 p.m., no private person was available to act as a witness. While Section 25 of the CNSA excludes the application of Section 103, Cr.P.C. and thus does not legally compel the prosecution to associate private witnesses, yet when a recovery is alleged to have occurred at a busy public place, the failure to associate any private person despite their availability naturally arouses suspicion about the genuineness of the recovery. The Hon'ble Lahore High Court in 2024 PCrLJ 370 has held that in cases where the entire testimony hinges on police officials alone, and where the alleged recovery was made on a road, the omission to secure independent mashirs, especially in police cases, cannot be lightly brushed aside by the court.

18. *Second*, and more significantly, the Hon'ble Supreme Court of Pakistan in Criminal Petition No. 1192/2023, decided on 22.11.2023, has clearly observed that it is surprising that, in the month of May at 6:00 p.m.

during daylight hours at a popular public park, the only witnesses were policemen and none of them made a video recording or took any photographs of the seizure and arrest. The Hon'ble Court further observed that it fails to understand why the police and members of the Anti-Narcotics Force do not record or photograph when search, seizure and arrest are made, and that Article 164 of the Qanun-e-Shahadat, 1984 specifically permits the use of evidence that may have become available through modern devices or techniques. The Hon'ble Court directed that, if the police and Anti-Narcotics Force were to use their mobile phone cameras to record and photograph the search, seizure and arrest, it would be useful evidence to establish the presence of the accused at the crime scene, their possession of the narcotic substance, the search and its seizure, and would also prevent false allegations that the narcotic substance was foisted upon them for ulterior motives. The Hon'ble Court also directed that a copy of the order be sent to the Secretary Ministry of Narcotics Control, Director-General Anti-Narcotics Force, Secretaries of Home Departments of all provinces, and IGPs of all provinces and ICT, so that they may consider amending police rules to ensure video recordings and photographs whenever possible.

19. In the present case, the alleged recovery took place on 01.01.2023 at about 6:30 p.m. at the Excise Check Post near Arore University on National Highway, admittedly the busiest road, and involved a huge commercial quantity of 100 kilograms of charas. All excise officials present at the spot were admittedly carrying mobile phones with cameras, yet not a single photograph was taken and no video recording was made of the alleged recovery or of the appellants at the spot. No explanation whatsoever has been offered by the prosecution for this glaring omission, and the learned trial Court did not even advert to this material aspect in the impugned judgment.

In our considered opinion, the failure to make any video recording or take any photograph of such a large quantity of contraband at a busy public place in daylight hours, despite the clear directions of the Hon'ble Supreme Court and despite all officials having the necessary means, seriously undermines the credibility of the prosecution case and lends credence to the appellants' plea that the contraband was foisted upon them. If the recovery was genuine, as claimed, there was no reason for the excise officials not to record it, which would have conclusively established the prosecution case and protected them from allegations of foisting; the deliberate failure to do so, in the face of clear directions from the apex court, can only lead to an adverse inference against the prosecution.

20. *Third,* there is a serious discrepancy in the weight of the recovered contraband. According to the FIR and the charge, the total weight of the recovered charas was 100 kilograms, but the record shows that when the case property was produced before the trial Court, the actual weight was only 88 kilograms. This unexplained shortfall of 12 kilograms has not been mentioned in the impugned judgment, much less explained by the prosecution, and during the hearing of the appeal, the learned DPP for the State could not offer any explanation for this glaring discrepancy. In our view, this unexplained loss of 12 kilograms from the sealed case property, allegedly kept in safe custody in the Malkhana, completely destroys the prosecution's case regarding safe custody and raises serious doubt about whether the recovery was made as alleged or whether the contraband was foisted upon the appellants. The prosecution is required to establish an unbroken chain of custody from recovery to chemical examination, and any break in that chain creates reasonable doubt. In Kamran Shah v. State and Razia Sultana v. State, the Hon'ble Supreme Court has held that safe custody

and safe transmission of samples are essential for conviction, and in their absence, reliance cannot be placed on the Chemical Examiner's report. In the present case, the unexplained loss of 12 kilograms from the sealed case property indicates that the chain of custody has been broken and the case property has not been kept in safe custody, a circumstance sufficient in itself to create reasonable doubt in the prosecution case.

21. *Fourth*, the prosecution has failed to prove that the alleged wooden cavity in the oil tanker had the physical capacity to accommodate 100 packets containing 200 slabs of charas weighing 100 kilograms. Both prosecution witnesses admitted in cross-examination that they did not measure the size of the wooden cavity in length, width and height. PW-02 admitted that speakers are installed in the wooden cavity, that it is like a tool box, that one corner touches the driver's seat and the other the front seat, and that no lock is installed in it. Learned counsel for the appellants strongly contended that the wooden cavity in oil tankers is essentially a tool box meant for tools and fire extinguishers and cannot physically accommodate 100 packets containing 200 slabs of charas weighing 100 kilograms, and further submitted that when the vehicle was produced before the trial Court, defence counsel pointed out that even one of the three bags containing the alleged charas could not fit into the cavity. The learned trial Court summarily rejected this contention by merely observing that it is incorrect to suggest that 100 kilograms of charas cannot be stored in a wooden cavity, without ordering any measurement, verification or expert examination. In our considered opinion, when the defence raised the issue of physical impossibility and specifically contended that the alleged cavity could not accommodate the alleged quantity of contraband, it was incumbent upon the prosecution to prove, by measurements, photographs and, if necessary,

expert evidence, that the cavity had the physical capacity to hold the alleged quantity. The failure of the prosecution to do so, coupled with the trial Court's refusal to order any verification, amounts to denial of a fair opportunity to the appellants to prove their defence, and the learned trial Court should have ordered measurement of the cavity and examined whether 100 packets containing 200 slabs weighing 100 kilograms could physically fit into it. The failure to do so constitutes improper evaluation of evidence and creates reasonable doubt in the prosecution case.

22. *Fifth*, PW-01 is the complainant, the Investigating Officer and also a witness to the alleged recovery. While it is true that there is no legal bar on a police officer investigating a case lodged by him, as held in State v. Bashir (PLD 1997 SC 408) and Zafar v. State (2008 SCMR 1254), yet when the complainant also acts as the Investigating Officer, such evidence requires heightened scrutiny and must be corroborated by independent evidence. In the present case, not only is there no independent corroboration, but the Investigating Officer's testimony itself suffers from serious infirmities. In cross-examination, he admitted that he does not remember the exact date of his visit to Khyber Pakhtunkhwa for investigation, that he does not remember how many excise officials accompanied him, and that he does not remember through which courier service letters were sent to the Motor Registration Authority Kohat and the Senior Superintendent of Police Peshawar. These lapses of memory regarding important steps in the investigation create doubt about the thoroughness and genuineness of the investigation. Moreover, he admitted that he did not record the currency numbers of the notes recovered from the appellants in the memo of arrest and recovery or in the FIR, an omission that is material because it prevents verification of the actual cash recovered and opens the possibility of

substitution or manipulation. He also admitted that he did not measure the size of the wooden cavity in length, width and height, which, as discussed above, is a fatal omission. He further admitted that he did not produce the appellants before the learned Judicial Magistrate for recording confessional statements under Section 164, Cr.P.C., although, according to the prosecution's own case, both appellants had admitted their guilt during investigation at the police station. If the appellants had really made confessional statements at the police station, there was no reason for the Investigating Officer not to produce them before a Magistrate for recording their confessions under Section 164, Cr.P.C., which would have been admissible evidence against them; the failure to do so creates doubt about whether the appellants really made any confessional statements at all.

23. *Sixth,* though copy of register XIX produced as Ex. 6/E, yet no time of deposit the case property in Malkhana nor its dispatch for chemical analysis shown. Such discrepancy further emerged as the letter issued to the chemical examiner produced as Ex. 6/F shows to be issued on 01.01.2023; however, chemical report produced as Ex. 6/K shows the property was received at the office of Chemical Examiner, Chemical Laboratory Sukkur at Rohri on 02.01.2023 and no explination has been furnished by the prosecution in this regard; therfore, safe custody and safe transmission of the property to chemical laboratory has been compromised, hence chemical report has lost its sanctity.

24. *Seventh,* both the witnesses in their testimony deposed that the memo of arrest and recovery being back bone of the case as well as statements of prosecution witnesses were recorded by the ED Hubdar Ali and admittedly he has not been examined by the prosecutionfor for the

reason best known to them, hence such piece of evidence has lost its probate value.

25. *Eighth,* the prosecution case is contradicted by the tracker record produced by the appellants. The appellants have produced a printout of the tracker record showing the movement of the oil tanker bearing registration No. C-9176 on the relevant dates. According to this record, on 30.12.2022 at 12:12 p.m., the vehicle stopped at Kot Sabzal in Punjab and remained there for three hours and fifteen minutes; at 4:33 p.m. on 30.12.2022, it stopped at Public School Ubaoro; at 1:46 a.m. on 31.12.2022, it started moving from Public School Ubaoro but again stopped at 1:49 a.m. on 31.12.2022 at Public School Ubaoro and remained there until 11:08 a.m. on 01.01.2023. Thus, the vehicle remained stationary at Public School Ubaoro from 1:49 a.m. on 31.12.2022 until 11:08 a.m. on 01.01.2023, a period of more than 33 hours, which completely contradicts the prosecution's case that the vehicle was intercepted at the Excise Check Post near Arore University on National Highway at 6:30 p.m. on 01.01.2023. The learned trial Court rejected this documentary evidence on the ground that the appellants failed to produce the official tracker record of the company and did not examine the concerned official, but we find that this reasoning is not sound. The appellants had filed an application before the trial Court requesting that the official tracker record be summoned from the tracker company, but the application was kept pending for about four months and then dismissed; thereafter, the appellants produced the tracker record obtained by them from the tracker company. This is a documentary record showing the date, time and location of the vehicle based on GPS coordinates, and the prosecution has neither disputed its authenticity nor produced any contrary record or evidence to rebut it. Article 164 of the Qanun-e-Shahadat, 1984 specifically permits the use of

evidence produced through modern devices or techniques, and the tracker record is evidence produced through a modern device installed in the vehicle for tracking its movement. The burden was on the prosecution to rebut this documentary evidence if it contended that it was false or fabricated, but the prosecution has neither disputed its authenticity nor explained how the vehicle could have been at Public School Ubaoro until 11:08 a.m. on 01.01.2023 and then be intercepted at Arore University at 6:30 p.m. on the same day, a location about 45 kilometres away. In our considered opinion, the tracker record is credible documentary evidence which supports the defence version that the vehicle was taken into custody by the excise police on 30.12.2022 and kept at Public School Ubaoro, and that the false FIR was registered on 01.01.2023 after foisting the contraband upon the appellants, and the learned trial Court erred in rejecting this material documentary evidence without any valid reason.

26. *Ninth,* the appellants have produced two independent witnesses, Muhammad Sudheer and Haq Nawaz, who have deposed that the appellants were arrested on 30.12.2022 from Qutubdin Rest Area on the Motorway. DW-01 Muhammad Sudheer stated that on 30.12.2022 at about 3:00 p.m. he was at Qutubdin Rest Area when a golden-coloured GLI car with four persons in black civil clothes arrived and two persons took away accused Sirajuddin along with his two friends. DW-02 Haq Nawaz stated that on 30.12.2022 at about 1:00 to 2:00 p.m. he was at the petrol pump at Qutubdin Rest Area when a golden colour GLI car with five persons in black civil clothes arrived and three persons took away Akbar Hussain in the oil tanker. The learned trial Court rejected the testimony of these two defence witnesses solely on the ground that there is a contradiction between them regarding the number of excise officials who came to arrest the appellants, with one

witness stating four officials and the other five. In our considered opinion, this is an overly technical approach and amounts to throwing out the baby with the bathwater. Both defence witnesses are consistent on the material facts, namely that the appellants were arrested on 30.12.2022 from Qutubdin Rest Area on the Motorway by excise officials who came in a golden-coloured GLI car in civil clothes. The minor discrepancy regarding whether there were four or five officials is a peripheral detail which does not go to the root of the matter. It is well-settled that minor contradictions on immaterial details do not vitiate the testimony of witnesses if they are consistent on the core facts of the case. The Hon'ble Supreme Court has held in numerous cases that minor discrepancies in the deposition of witnesses should not be a ground to discard their testimony if the substance of their testimony is consistent, and in 2025 SCMR 1123 it has been held that minor discrepancies in the deposition of prosecution witnesses of less than major and significant nature, which do not corrode the foundation of the case, cannot be a ground to discard testimony; the same principle applies with equal force to defence witnesses. In the present case, both defence witnesses have consistently stated that the appellants were arrested on 30.12.2022 from Qutubdin Rest Area, which completely contradicts the prosecution's case that they were arrested on 01.01.2023 from Arore University. Moreover, these are not interested witnesses; they are not relatives of the appellants, but independent witnesses who have come forward to testify in favour of the appellants at the risk of antagonizing law enforcement agencies, and it is common knowledge that ordinary citizens are generally reluctant to testify against law enforcement agencies. In such circumstances, when independent witnesses have come forward to testify and their testimony on material facts is consistent, the trial Court should not have rejected their testimony merely

on the ground of a minor discrepancy on a peripheral detail, and the learned trial Court has erred in applying an overly technical approach and in failing to appreciate that the core testimony of both defence witnesses supports the appellants' version that they were arrested on 30.12.2022 and not on 01.01.2023.

27. *Tenth,* the appellants filed applications before the trial Court requesting that the CCTV footage from Qutubdin Rest Area on the Motorway be summoned from the Motorway Authority and that the official tracker record be summoned from the tracker company, in order to prove that they were arrested on 30.12.2022 from that location. These applications were kept pending by the trial Court for approximately four to four and a half months and then dismissed. This inordinate delay effectively frustrated the appellants' right to prove their innocence, because by the time the applications were decided, the CCTV footage would have been overwritten or deleted, as such footage is generally not retained for more than a few weeks or months. The right to fair trial is a fundamental right guaranteed under Article 10-A of the Constitution of the Islamic Republic of Pakistan, and it includes the right of an accused to produce evidence in his defence. When an accused files an application for summoning evidence which is relevant and material to his defence, the trial Court is duty-bound to decide such application expeditiously and to summon the evidence if the application is found to be bona fide and the evidence is relevant. In the present case, the CCTV footage from Qutubdin Rest Area on the Motorway on 30.12.2022 was directly relevant to the appellants' defence that they were arrested on that date from that location and not on 01.01.2023 from Arore University as alleged by the prosecution, and similarly, the official tracker record from the tracker company was directly relevant to prove the movement of the vehicle

and to establish that it was at Public School Ubaoro during the relevant period and not at Arore University as alleged. The trial Court should have decided these applications on a priority basis and should have summoned the evidence; the delay of four to four and a half months in deciding these applications, followed by their dismissal, amounts to denial of a fair trial to the appellants. The learned trial Court has further erred in stating in the impugned judgment that no record was given to the Court by the appellants regarding the movement of the vehicle, whereas the tracker record is admittedly part of the trial Court file as the appellants produced the same after their application for summoning the official record was dismissed.

28. *Eleventh*, both appellants examined themselves on oath and categorically stated that they were arrested on 30.12.2022 from Qutubdin Rest Area on the Motorway and were kept in illegal confinement for two days at a school, and that the false FIR was registered against them on 01.01.2023 after foisting the contraband upon them. Appellant Akbar Hussain specifically stated that he was alone in the oil tanker and had stopped at Qutubdin Rest Area for lunch and prayers when excise officials came and arrested him after inquiring about Saleem Nawaz, while appellant Sirajuddin specifically stated that he was travelling with his friends Younis and Ayaz in a separate car and had stopped at Qutubdin Rest Area when he was arrested after coming out of the washroom. Both appellants further stated that excise officials recovered cash from them but the amount shown in the FIR is much less than the actual amount recovered. While the statements of accused on oath are self-serving and must be scrutinized carefully, yet when such statements are corroborated by independent evidence, they cannot be ignored. In the present case, the appellants' statements on oath are corroborated by the tracker record, which shows that the vehicle was at

Public School Ubaoro during the relevant period, and are also corroborated by the two independent defence witnesses who have stated that the appellants were arrested on 30.12.2022 from Qutubdin Rest Area. In such circumstances, the appellants' version cannot be brushed aside as an afterthought or a false defence.

29. After a careful examination of the entire evidence and material on record, we are of the considered opinion that the prosecution has failed to prove its case against the appellants beyond reasonable doubt. The entire prosecution case rests on the testimony of two excise officials, one of whom is the complainant and the other his subordinate, with no independent corroboration of their testimony. No private person has been associated as a witness despite the alleged recovery taking place at the busiest road at 6:30 p.m., no video recording has been made and no photograph has been taken of the alleged recovery despite all excise officials having mobile phones with cameras and despite the clear directions of the Hon'ble Supreme Court, there is a material discrepancy of 12 kilograms in the weight of the recovered contraband which has not been explained by the prosecution, the prosecution has failed to prove the physical capacity of the wooden cavity to accommodate 100 kilograms of charas, the complainant is also the Investigating Officer and his investigation suffers from serious lapses including failure to note currency numbers, failure to measure the cavity, failure to record confessional statements under Section 164, Cr.P.C., and inability to remember important details of the investigation, the tracker record produced by the appellants shows that the vehicle was at Public School Ubaoro from 31.12.2022 until 11:08 a.m. on 01.01.2023, which completely contradicts the prosecution's case that the vehicle was intercepted at Arore University at 6:30 p.m. on 01.01.2023, the two

independent defence witnesses have consistently stated that the appellants were arrested on 30.12.2022 from Qutubdin Rest Area, and the trial Court has frustrated the appellants' right to prove their innocence by delaying their applications for summoning CCTV footage and official tracker record for four to four and a half months and then dismissing the same.

30. When we evaluate the cumulative effect of all these circumstances, we find that the prosecution has not only failed to prove its case beyond reasonable doubt, but the defence has also been able to create more than reasonable doubt in the prosecution case. The tracker record is contemporaneous documentary evidence produced through a modern device which shows the location of the vehicle at the relevant time based on GPS coordinates, and this documentary evidence has not been rebutted by the prosecution. The two independent defence witnesses have consistently testified that the appellants were arrested on 30.12.2022 from Qutubdin Rest Area. The appellants' statements on oath are consistent with the tracker record and the testimony of the defence witnesses. On the other hand, the prosecution case suffers from numerous infirmities, contradictions and omissions as discussed in detail above. In such circumstances, when two views are possible, one in favour of the prosecution and the other in favour of the accused, the view favourable to the accused must be adopted. The benefit of doubt, which is a valuable right of an accused and is deeply rooted in Islamic jurisprudence and the common law system, must be extended to the appellants.

31. It may be mentioned here that the Control of Narcotic Substances Act, 1997 has been enacted to combat the menace of drug trafficking, which is indeed a serious crime affecting society and particularly the youth. The courts must ensure that the guilty are punished and deterred from committing

such heinous crimes. However, at the same time, the courts must also ensure that innocent persons are not convicted on the basis of doubtful evidence. The prosecution is required to prove its case beyond reasonable doubt, and if it fails to do so, the accused must be acquitted even though the offence is serious and even though the punishment is stringent. The seriousness of the offence and the stringency of the punishment make it all the more necessary to ensure that the proof is strict and that there is no reasonable doubt in the prosecution case. In the present case, for the reasons discussed in detail above, we are of the considered opinion that the prosecution has failed to prove its case against the appellants beyond reasonable doubt, and the appellants are entitled to the benefit of doubt.

32. Before parting with this judgment, we consider it appropriate to make certain observations for the guidance of the trial Courts and the law enforcement agencies. *First,* the Hon'ble Supreme Court of Pakistan in Criminal Petition No. 1192/2023 has clearly directed that video recordings should be made and photographs should be taken when search, seizure and arrest are made, as Article 164 of the Qanun-e-Shahadat, 1984 specifically permits the use of evidence that may have become available through modern devices or techniques. All law enforcement agencies, including the Excise Department, must comply with this direction of the apex court and must ensure that video recordings are made and photographs are taken of all recoveries, particularly when such recoveries take place at public places in daylight hours and when all officials have mobile phones with cameras. The failure to do so without any valid explanation should be treated as a factor weakening the prosecution case and creating an adverse inference against the prosecution.

33. *Second*, when a defence raises the issue of physical impossibility and contends that the alleged concealment space does not have the physical capacity to accommodate the alleged quantity of contraband, the trial Court must order verification through measurements, photographs and, if necessary, expert evidence. The trial Court cannot summarily reject such a defence without any verification or examination. The failure to do so amounts to denial of a fair trial and improper evaluation of evidence.

34. *Third*, when an accused files an application for summoning evidence which is relevant and material to his defence, such as CCTV footage or tracker records or any other time-sensitive evidence, the trial Court must decide such application on a priority basis and must not delay the decision for months. An inordinate delay in deciding such applications effectively frustrates the accused's right to prove his innocence and amounts to denial of fair trial guaranteed under Article 10-A of the Constitution.

35. *Fourth*, when documentary evidence such as tracker records produced through modern devices is produced by the defence, and such evidence is not disputed or rebutted by the prosecution, the trial Court cannot reject such evidence merely on the ground that the official of the company has not been examined as a witness. The burden is on the party challenging the authenticity of such documentary evidence to rebut it by contrary evidence or by establishing that the document is false or fabricated. Article 164 of the Qanun-e-Shahadat, 1984 specifically permits evidence produced through modern devices, and such evidence should be given due weightage.

36. *Fifth*, when private persons are not associated as witnesses in cases where recoveries take place at busy public places, the prosecution should provide a satisfactory explanation as to why private persons were not available or could not be associated. The mere statement that efforts were

made but private persons were not available is not sufficient. The trial Court should examine this aspect carefully and should require the prosecution to explain what specific efforts were made and why those efforts failed.

37. *Sixth,* when the complainant is also the Investigating Officer, the trial Courts should subject such evidence to heightened scrutiny and should require stronger corroboration from independent sources. While there is no legal prohibition for a police officer to investigate the case lodged by him, yet such a situation has inherent dangers of bias and manipulation, and therefore requires careful examination by the courts.

38. *Seventh,* when defence witnesses give testimony which is consistent on material facts but contains minor discrepancies on peripheral details, the trial Courts should not reject such testimony merely on the ground of such minor discrepancies. The courts must distinguish between material contradictions which go to the root of the matter and immaterial contradictions which relate to peripheral details. Minor discrepancies on peripheral details do not vitiate the testimony if the core facts are consistent.

39. *Lastly,* in all cases involving recovery of contraband, the prosecution must establish safe custody and safe transmission of the case property from recovery to chemical examination. Any discrepancy in the weight of the case property must be satisfactorily explained by the prosecution. The failure to do so creates reasonable doubt about the recovery and the chain of custody.

40. For the foregoing reasons, we are of the considered opinion that the conviction of the appellants is not sustainable in the eyes of law and the appellants are entitled to acquittal on the basis of benefit of doubt. Consequently, the instant criminal appeal is allowed. The impugned judgment dated 23.02.2024 passed by the learned IIIrd Additional Sessions

Judge/MCTC-II/Special Judge (CNS), Sukkur in Special Case No.53/2023 is set aside. The appellants Akbar Hussain and Sirajuddin are acquitted of the charge under Section 9(3) (e) of the Control of Narcotic Substances Act, 1997 by extending to them the benefit of doubt. The appellants shall be released forthwith if not required in any other case. The case property, namely the oil tanker bearing registration No. C-9176 (Kohat) and the personal belongings of the appellants including their CNICs, mobile phone, driving licence and cash, shall be restored to the rightful owners after proper verification of ownership, subject to any lawful claim by third parties and subject to any order that may have been passed by any competent court in any other case. A copy of this judgment be sent to the Inspector General of Police, Sindh, the Director General, Excise and Taxation Department, Government of Sindh, and the learned IIIrd Additional Sessions Judge/MCTC-II/Special Judge (CNS), Sukkur for information and necessary action in accordance with the observations made hereinabove.

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