

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

Before:

Mr. Justice Mohammad Karim Khan Agha
Justice Mrs. Kausar Sultana Hussain

Cr. Appeal No.D-88 of 2020

Ayaz Ali

Versus.

The State.

Appellant : Ayaz Ali (present on bail)	Through Mr. Ghulam Shabbir Mari, Advocate
Respondent : The State	Through Mr. Shahzad Saleem Nahiyoona, Additional Prosecutor General, Sindh
Date of hearing	17.01.2023
Date of judgment	19.01.2023

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- This criminal appeal is directed against the judgment dated 22.10.2020, passed by learned Additional Sessions Judge-I / Special Judge for CNS Cases / Judge (MCTC), Sanghar, in Special Case No. 47 of 2020, arising out of Crime No.206 of 2020, registered at Police Station Shahdadpur, under section 9(c) of Control of Narcotic Substances Act, 1997, whereby the appellant has been convicted under the said section and sentenced to suffer imprisonment for 04 years and 06 months and to pay fine of Rs.20,000/-. In case of default in payment of fine he was ordered to suffer simple imprisonment for 05 months more. Benefit of Section 382-B Cr.P.C. was also extended to the accused.

2. The brief facts of the prosecution case are that on 01.09.2020 a police party headed by complainant SIP Manzoor Ali Babbar of P.S Shahdadpur, during patrolling in their area, upon receiving spy information regarding sale of Charas by present accused, at 1800 hours reached at Barhoon road near Peer Korral Shah Rasti, Taluka Shahdadpur, where they saw the present accused standing having black bag, who on seeing police-party tried to flee; however, police party alighted from vehicle and tactfully apprehended him with black bag. On

enquiry, the accused disclosed his name as Ayaz Ali S/o Mevo, by caste Rind, resident of Mehram Rind, Taluka Shahdadpur. The black bag recovered from the accused was found containing four small/big pieces of Charas. On personal search of the accused nothing was recovered. The recovered charas weighed and found to be 1020 grams. On enquiry accused disclosed that he earns his livelihood by selling said charas. Out of recovered Charas small quantities from each piece total 20 grams Charas was taken out as sample for chemical examination and sealed in a parcel and remaining Charas was sealed in a separate parcel. Such mashirnama of arrest and recovery was prepared in presence of mashirs PC Muhammad Nawaz and PC Arshad Ali and then police party brought the accused and recovered case property at police station where complainant lodged the FIR against the accused.

3. After usual investigation, the matter was challaned and accused claimed to be tried. In order to prove its case the prosecution examined 03(three) witnesses and exhibited various documents and other items. The appellant in his statement recorded under Section 342 Cr.P.C denied the prosecution's allegation by pleading innocence; he, however, did not examine himself on oath or any one in his defense.

4. After hearing the parties and appreciation of the evidence on record the trial court found the appellant to be guilty for the above said offence and then convicted and sentenced him as set up earlier in this judgment, which is impugned by the appellant before this Court by way of instant appeal.

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

6. Learned counsel for the appellant has contended that the appellant is completely innocent and has been falsely implicated in this case by the police in collusion with influential persons of the area; that there are material contradictions in the evidence of the witnesses which renders their evidence unreliable; that the recovered narcotic was foisted on him by the police; that S.103 Cr.PC was violated as there was no independent mashir; that the prosecution had failed to prove safe custody and safe transmission of the narcotic from the time it was recovered from him until the time it was taken to the chemical examiner and as such the chemical report is of no legal value and for any or all of the above

reasons he be acquitted of the charge by being extended the benefit of the doubt. In support of his contentions he has placed reliance on the cases of **Sultan Ahmed V The State** (2020 MLD 682), **Samano Kanrani V The State** (2020 MLD 486), **Shakeel alias Hakla V The State** (2018 MLD 1396) and **Muhammad Jabir alias Viki V The State** (2019 MLD 1743).

7. On the other hand learned Additional Prosecutor General Sindh appearing on behalf of the State has fully supported the impugned judgment. In particular he has stressed that the accused was caught red handed on the spot in possession of narcotics; that the witnesses have fully implicated the appellant in this crime and since they had no ill will or enmity towards the accused there evidence could be safely relied upon; that safe custody and safe transmission of the narcotic to the chemical examiner had been proved which lead to a positive report and as such the prosecution had proved its case against the accused beyond a reasonable doubt and the appeal be dismissed.

8. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence and considered the relevant law including the case law cited at the bar.

9. In narcotic cases, one of the **most crucial** aspects of the case is that the prosecution must prove safe custody of the narcotic from the time of its recovery until the time when it is sent for chemical examination. If they fail to do so then there is a possibility that the narcotic substance had been tampered with before it was received at the chemical laboratory for its examination. In such like cases where unbroken chain of custody cannot be proved by the prosecution then the chemical report is of no legal value. It is noted that this is the view taken by the Supreme Court **regardless** of the amount of the recovered narcotic whether small or large as the principle remains the same. In this case the appellant was arrested by the police on 01.09.2020 when narcotics weighing 1020 grams were recovered from his person. Those narcotics according to the evidence of the complainant were taken to the PS where they were handed over to PW 3 Maqbool Ahmed who was the IO of the case which he placed in the malkhana for safe keeping for which a malkhana entry was produced. Three days later on 04.09.2020 he took out the narcotics from the Malkhana and gave them to PC Imran Ali to deliver to the chemical examiner. Neither the head of the malkhana Abdul Jabbar was examined to prove that the narcotics had been kept safely in the malkhana without interference for this three day period nor

was PC Imran Ali who allegedly took the narcotics to the chemical examiner. Thus, there is no cogent evidence that the narcotic was kept safely in the Malkhana without interference for this three day period and no evidence that it was actually taken for chemical examination by PC Imran Ali. Thus, based on the particular facts and circumstances of this case we find that the prosecution has **not** been able to prove safe custody of the narcotic from the time when it was recovered from the appellant till the time when the same was sent for chemical examination as it appears that the narcotic might have been unaccounted for for at least three days during which time it could have been tampered with or when it was taken for chemical examination and as such the chemical report is of no legal value to the prosecution in proving the recovered narcotic.

10. With regard to the importance of the prosecution proving safe custody of the narcotic from the time of its recovery to the time it was sent for chemical analysis the same was stressed/emphasized by the Supreme Court in the case of **Qaisar V State** ((2021 SCMR 363) which held as under;

*"3. We have heard the learned counsel for the petitioner as well as the learned Additional Advocate General, KPK and perused the available record alongwith the impugned judgment with their assistance and observed that in this case the prosecution has failed to establish the safe custody and safe transmission of sample parcels to the concerned laboratory. This court had laid down in many judgments that the representative samples of the alleged drug must be kept in safe custody and undergo safe transmission from the stage of recovery till its submission to the office of the Government analyst. **Non establishing the said facts would caste doubt and would impair and vitiate the conclusiveness and reliability of the report of the Government analyst. Thus rendering it incapable of sustaining conviction.***

*4. In the present case no police official was produced before the Trial Court to report about safe custody of samples if entrusted to him for being kept in the Malkhana in safe custody. Even the police official whose belt number (FC 4225) has been mentioned by the Government analyst in his report, was not produced by the prosecution to depose regarding the safe deposit of the said sample parcels in the concerned laboratory. The record reveals that the recovery was allegedly affected on 19.08.2011 whereas, according to the report of chemical examiner, the sample parcels were received in the said office on 26.08.2011. **Nobody from the prosecution side was produced to claim that***

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during this period the said sample parcels remained intact in his possession or under his control in the Malkhana in safe custody. Even the prosecution is silent as to where remained these sample parcels from 19.08.2011 to 26.08.2011. In absence of establishing the safe custody and safe transmission, the element of tampering cannot be excluded in this case. The chain of custody of sample parcels begins from the recovery of the narcotics by the police including the separation of representative samples of the recovered narcotics, their dispatch to the Malkhana and further dispatch to the testing laboratory. The said chain of custody and transmission was pivotal as the entire construct of the Act 1997 and the Control of Narcotic Substance (Government Analysts) Rule 2001 (Rules 2001), rest upon the report of the analyst. It is prosecution's bounded duty that such chain of custody must be safe and secure because the report of chemical examiner enjoined critical importance under the Act 1997, and the chain of custody ensure the reaching of correct representative samples to the office of chemical examiner. Any break in the chain of custody i.e. the safe custody or safe transmission of the representative samples, makes the report of chemical examiner worthless and un-reliable for justifying conviction of the accused. Such lapse on the part of prosecution would cast doubt and would vitiate the conclusiveness and reliability of the report of chemical examiner. Reliance can be made upon the judgments rendered by the three members benches of this court i.e. Ikramullah v. the State (2015 SCMR 1002), the State v. Imran Bakhsh (2018 SCMR 2039), Abdul Ghani v. the state (2019 SCMR 608), Kamran Shah vs. The State (2019 SCMR 1217), Mst. Razia Sultana v. the State (2019 SCMR 1300), Faizan Ali v. the State (2019 SCMR 1649), Zahir Shah alias Shat v. State thr. AG KPK (2019 SCMR 2004), Haji Nawaz v. the State (2020 SCMR 687), Qaiser Khan v. the State (2021 SCMR 363), Mst. Sakina Ramzan v. the State (2021 SCMR 451), Zubair Khan v. the State (2021 SCMR 492) and Gulzar v. the State (2021 SCMR 380)."(bold added)

11. Thus for the reasons mentioned above we find that the prosecution has failed to prove safe custody of the narcotic from the time when it was recovered from the accused until the time it was sent for chemical analysis and as such the possibility of the narcotic being tampered with during this period cannot be ruled out. Thus, we find that the prosecution has **not** proved its case beyond a reasonable doubt against the appellant and hence by being extended the benefit of the doubt the appellant is acquitted of the charge, the impugned judgment is set aside

and the appeal is allowed. The appellant on bail shall have his bail bonds discharged and is free to go.

12. The appeal stands disposed of in the above terms.