

ORDER SHEET  
IN THE HIGH COURT OF SINDH,  
CIRCUIT COURT, HYDERABAD.

Criminal Appeal No.D- 99 & 102 of 2015

DATE	ORDER WITH SIGNATURE OF JUDGE
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07.02.2023.

Mr. Ali Asghar Leghari, Advocate for appellants.  
Mr. Shahzado Saleem Nahiyoona, Additional P.G for State.  
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We have heard learned counsel for appellants and learned A.P.G.

Reserved for judgment.

Tufail

No Quis in S. 342  
No Sfr Custody

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

Present:-

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

1. Cr. Appeal No.D- 99 of 2015
2. Cr. Appeal No.D- 102 of 2015

Appellants Javed Khan Niazi in Cr. Appeal No.D-99 of 2015 and Syed Rasool in Cr. Appeal No.D-102 of 2015	through Mr. Ali Asghar Laghari, Advocate
Respondent : The State	through Mr. Shahzado Saleem Nahiyoan, Additional Prosecutor General, Sindh
Date of hearing	07.02.2023
Date of judgment	16.02.2023

### J U D G M E N T

**MOHAMMAD KARIM KHAN AGHA, J.**-As the both captioned appeals have been preferred by the aforementioned appellants by assailing the same judgment, which was the outcome of one and similar offence as well as FIR and evidence, hence common questions of facts and circumstances are involved; therefore, by this common judgment we intend to dispose of both the instant appeals together.

2. Appellants Syed Rasool and Javed Khan were tried by the learned Special Judge (CNS) / Sessions Judge, Jamshoro at Kotri, in Special Case No.09 of 2014, emanating from Crime No.02 of 2014,



registered at Police Station Excise Circle, Kotri, under section 9(C) Control of Narcotic Substances Act, 1997; and, vide judgment dated 08.10.2015 (the impugned Judgment), they both were convicted and sentenced to suffer imprisonment for life and to pay fine of Rs.500,000/- each, in case of default in payment of fine each accused shall suffer R.I for 03 years more. Benefit of section 382-B Cr.P.C was also extended to the accused.

3. The facts of the prosecution case as disclosed in the FIR are as under:-

*"That on 17.04.2014 complainant E.I Mujahid Ahmed Qureshi of Excise Circle, Kotri alongwith his subordinate staff EC Abdul Ghaffar, EC Mushtaque Ahmed and EC Atta Muhammad were on routine duty of checking vehicles at Excise Check Post, near Jamshoro Toll Plaza vide entry No.2891. At 12-00 a.m (night) they gave signal to stop to a Trawler bearing Registration No.LS-4277 going towards Karachi side, which was loaded with a NATO vehicle. The driver of the Trawler while seeing Excise police tried to run away. The vehicle being suspected was stopped and driver of the Trawler was apprehended. On enquiry, the driver of Trawler disclosed his name as Syed Rasool Awan, the person who was sitting beside him disclosed his name as Javed Khan resident of Baldia Karachi. The complainant cited EC Abdul Ghaffar and EC Mushtaque Ahmed and mashirs and conducted search of the Trawler. The complainant party opened two spare tyres of Trawler and found 120-packets chars in the shape of slabs and round, wrapped with plastic. On further search of accused Syed Rasool, complainant secured cash of Rs.1400/- from his side pocket of shirt, as well as fitness certificate, driving license, builtty of NATO vehicle, documents and photocopy of CNIC. Nothing was secured from accused Javed Khan during his personal search. The complainant party weighed the chars, with each packet weighing 1-KG, total 120-KGs. The complainant party separated some chars from each packet and sealed total 10 samples of 10-grams each for chemical analysis and remaining chars was also sealed in three separate nylon bags. The accused on enquiry disclosed that they were taking such chars to Karachi for selling. Such memo of arrest and recovery was prepared and signatures of mashirs were obtained on it. Thereafter arrested accused and recovered property were brought at Excise Circle, Kotri where complainant lodged FIR on behalf of the State."*

4. The investigation of the crime was conducted by the I.O, who recorded the statements of the P.Ws as well as prepared other documents and after completing the same, challaned the case before the Court having jurisdiction.



5. The charge against the accused was framed under Ex.03, to which they pleaded not guilty and claimed to be tried vide their respective pleas Ex.04 to 05.
6. In order to substantiate its case, the prosecution examined 02 P.Ws. and exhibited numerous documents and other items. The statements of the accused u/s 342 Cr.P.C were recorded at Ex.09 and 10, wherein they have denied the prosecution allegations and claimed their false implication in this case. However, they neither examined themselves on oath in order to disprove the prosecution case nor led any evidence in defense.
7. Learned trial Judge after hearing the learned counsel for the parties and evaluating the evidence available on record convicted and sentenced the appellants as set out in the earlier para of this judgment. Hence the appellants have filed these appeals against there convictions.
8. 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.
9. Learned counsel for the appellants have contended that the appellants are completely innocent and have been falsely implicated in this case by the excise police; that they were not present at the scene; that there are material contradictions in the evidence of the PW's which renders such evidence unreliable; that there is inordinate delay of 08 days in sending the narcotic substance for its examination and report to Chemical Examiner; that safe custody of the narcotic had not been proved from the time when it was allegedly recovered and sent for chemical examination as well as received in the office of Chemical Analyser; that no private mashirs had been associated with the case and that for any or all the above reasons the appellants should be acquitted of the charge by extending them the benefit of the doubt. In support of his contentions, learned counsel for the appellants relied upon the cases of **Ayaz Hussain V The State** (2023 YLR 242), **Ghulam Shabbir and another V The State** (2023 YLR 153) and **Naveed Daud V The State** (2023 PCr.LJ 154).

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10. On the other hand, learned A.P.G fully supported the impugned judgment. In particular he has contended that the appellants were caught red handed on the spot with narcotics; that safe custody had been proved; that all the prosecution witnesses were reliable and trust worthy and supported the prosecution case and that there were no material contradictions in the prosecution evidence and as such the appeals should be dismissed.

11. We have considered the arguments of learned counsels, scanned the entire evidence available on record with their able assistance and considered the relevant law and authorities cited by them at the bar.

12. It appears from the evidence that of the 120Kg of the narcotics which were recovered only 10 samples of 10 grams were sent to the chemical examiner for testing a day after their recovery and then the whole balance of the recovered narcotic was sent to the chemical examiner 7 days later. In the appellant's S.342 Cr.PC statements however only the question of sending the 10 samples of the 10 grams which produced a positive chemical report was asked of the appellants and no question regarding the balance amount which was sent 7 days later which lead to a positive chemical report was asked to the appellants. It is well settled by now that if a question about a piece of evidence is not put to an accused during the recording of his S.342 Cr.PC statement it cannot be used to convict him. Thus, as no question regarding the recovered balance of the narcotic being sent to the chemical examiner 7 days later which produced a positive chemical report was asked to the appellants they cannot be convicted in respect of this quantity of recovered narcotic and can only be convicted in respect of the 10 samples of the 10 grams which were asked them making a total of 100grams. In this respect reliance, if any is needed, is placed on the case of **Haji Nawaz v The State** (2020 SCMR 687) where it was held as under in material part at para 3;

*".....The prosecution had maintained that samples had been secured from each and every packet of the recovered substance which samples had subsequently been tested positive by the Chemical Examiner but we note that at the time of recording the appellant's statement under Section 342, Cr.P.C. the report of the Forensic Science Laboratory*



*had not been put to him at all. The law is settled by now that if a piece of evidence or a circumstance is not put to an accused person at the time of recording his statement under Section 342, Cr.P.C then the same cannot be considered against him for the purpose of recording his conviction....."*

13. Even otherwise 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 unreliable and 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 appellants were arrested by the Excise police on 17.04.2014 when narcotics weighing 120Kgs were recovered from the spare tyres of a trawler which one of the appellants was driving whilst the other was his passenger. Those narcotics according to the evidence of the complainant and mashir who were the only PW's in this case were taken to the PS on 17.04.2014 and 10 samples of 10 grams were taken to the chemical examiner for analysis one day later on 18.04.2014 and 7 days later the entire balance of the recovered narcotics were taken to the chemical examiner for analysis. In respect of the **entire** recovered narcotics which were taken in 2 separate parts over 7 days from the PS to the chemical examiner there is no evidence where the narcotics were kept when the complainant returned to the PS with them. There is no evidence that the narcotics were kept in the malkhana of the PS, no malkhana entry was produced to show their deposit, the person in charge of the malkhana was not examined to prove that the narcotics were deposited in the malkhana and remained in safe custody until they were taken to the chemical examiner and the person who on two separate occasions 7 days apart took the narcotics to the chemical examiner for analysis was not examined. Thus it cannot be said with any degree of certainty where



the narcotics were actually kept for this one and 7 day period before they were taken to the chemical examiner on 18.04.2014 and 25.04.2014 respectively as there has been a **complete break** in the chain of custody of the narcotics from the time they were recovered to the time they were sent for chemical analysis and as such it cannot be ruled out that the narcotics were not tampered with during this period. 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 narcotics from the time when they were recovered from the appellants till the time when the same were sent for chemical examination as it appears that the narcotics were not accounted for between one and 7 days and could have been tampered with during this period which we find renders both the chemical reports unreliable and of no legal value to the prosecution in proving the recovered narcotics.

14. 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.*

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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 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)

15. Thus for the reasons mentioned above we find that the prosecution has failed to ask any question regarding the balance of the recovered narcotic (being most of it) to the appellants in their S.342 Cr.PC statements and cannot rely on this element of the recovery and has also failed to prove safe custody of the **entire** narcotics from the time when it was recovered from the appellants 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 appellants and hence by being extended the benefit of the doubt the appellants are acquitted of the charge, the impugned judgment is set aside and the appeals are allowed. The appellant's shall be released unless wanted in any custody case.

16. The appeals stand disposed of in the above terms.