

Narratives : No 1 Safe 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- 61 of 2019
2. Cr. Appeal No.D- 75 of 2019

Appellant Jumma Khan in Cr. Appeal No.D-61 of 2019	through Mr. Wazeer Hussain Khoso, Advocate
Appellants Yar Muhammad and Zaman in Cr. Appeal No.D-75 of 2019	through Mr. Aziz Ahmed Laghari, Advocate
Respondent : The State	through Mr. Agha Ghulam Nabi Special Prosecutor ANF
Date of hearing	31.01.2023
Date of judgment	07.02.2023

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.-As both the 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 question of facts and circumstances are involved; therefore, by this common judgment we intend to dispose of both the instant appeals together.

2. Appellants Yar Muhammad S/o Faqeer Muhammad , Zaman S/o Muhammad Moosa and Jumma Khan S/o Muhammad Khan Khosa were tried by the learned Special Judge (CNS) / Model Criminal Trial Court, Hyderabad, in Special Case No.29 of 2013, culminating

from Crime No. 03 of 2013, registered at Police Station ANF, Hyderabad, under section 9(C) Control of Narcotic Substances Act, 1997; and, vide judgment dated 06.04.2019, (the impugned Judgment), they all were convicted and sentenced to suffer imprisonment for life and to pay fine of Rs.500,000/- each and in case of default in payment of fine each accused shall suffer S.I for 02 months more. The 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:-

"On 28.05.2013, complainant Inspector Ghulam Abbas was available at P.S ANF, Hyderabad where he received spy information through his officers that men of provincial smuggler namely Agha Khan r/o Quetta have come alongwith heavy quantity of narcotics, will come to supply the same at Karachi to Jummo Khan Khoso r/o Jhudo in between 10-30 to 1-00 p.m near fish corner Giddu Chowk, Hyderabad. On such information, one raiding party consisted upon complainant, Subedar Abdul Shakoor and other staff alongwith government vehicle vide roznamcha entry No.5 at 10-00 hours left the P.S and reached at pointed out place at 10-15am where they saw one person standing in suspicion condition regarding whom, the spy has pointed out that he is Jumma Khoso who deals in narcotics at Jhudo. In the meantime, one suspicious Suzuki came and stopped near to him and two persons alighted from the Suzuki and met with him. Thereafter, both the persons brought him towards the back side of the Suzuki and behind the fruit patties, something was shown by them to him. Thereafter, all the three persons while boarding in the Suzuki started to go from there on which police party encircled the Suzuki. First they tried to make mashirs to the private persons, who have refused on which from raiding party, HC Sher Muhammad and PC Imtiaz Baladi were nominated as mashirs and then the apprehended persons were enquired about their names on which driver disclosed his name as Yar Muhammad s/o Faeer Muhammad and the second disclosed his name as Zaman s/o Muhammad Moosa, while the person sitting in the Suzuki disclosed his name as Jumo Khan s/o Muhammad Khan Khoso. On enquiry, all the three accused while taking the police party towards the back side of Suzuki disclosed the availability of 16 kattas containing narcotics. Kattas were taken out from the Suzuki and on checking secured 15 kattas, 25/25 total 375 packets while from one Katta 20 packets total weighing 395 were secured. One packet was opened and checked and found one foil packet, 2/3 slabs of chars in one white plastic, each foil pack packets was weighed with electronic scale and found each packet weighing 1/2 K.G, total weight 395 K.G chars. From each

foil pack packets, 10/10 grams of chars were separated for chemical examination whereas remaining chars was sealed separately in the same katta. From the right side pocket of Yar Muhammad one mobile alongwith two SIMS, one key of vehicle, and Rs.1340/- was secured while from accused Zaman, from the right pocket, one pursue containing NIC in the name of accused and Rs.360/, one mobile alongwith SIM and receipt were secured. Whereas from 3rd accused, from the front pocket, one Nokia mobile alongwith SIM and Rs.1230/- were secured. On search of Suzuki, from dashboard of the Suzuki registration papers were secured. As the accused have committed offence u/s 9-C Act, as such in presence of above mashirs such mashirnama was prepared. Thereafter, accused alongwith case property was brought at P.S where FIR was lodged against them 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.02, to which the accused pleaded not guilty and claimed to be tried vide their respective pleas Ex.3 to 5.

6. In order to substantiate its case, the prosecution examined 04 P.Ws. and exhibited numerous documents and other items and thereafter, the prosecution side was closed.

7. The statements of the accused u/s 342 Cr.P.C were recorded at Ex.11 to 14, 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.

8. 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 earlier in this judgment.

9. 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.

10. Learned counsel for the appellants have contended that the appellants are completely innocent and have been falsely implicated in this case by the ANF 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 safe custody of the narcotic had not been proved from the time when it was allegedly recovered and sent for chemical examination and as such the chemical report cannot be safely relied upon; 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 their contentions, learned counsels for the appellants relied upon the cases of **Abdul Ghani and others V The State and others** (2019 SCMR 608), **Kamran Shah and others V The State and others** (2019 SCMR 1217), **Faizan Ali V The State** (2019 SCMR 1649), **The State V Imran Nazir and another** (2019 SCMR 1227), **Abid Ali V The State** (2022 PCr.LJ 1088), **The State through Regional Director ANF V Imam Bakhsh and others** (2018 SCMR 2039) and **Akhtar Gul V The State** (2022 SCMR 1627), **Abid Ali V The State** (2022 PCr.LJ 1088).

11. On the other hand, learned Special Prosecutor ANF fully supported the impugned judgment. In particular he has contended that the appellants were caught red handed on the spot with the 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. In support of his contentions he placed reliance on the cases of **Muhammad Sarfraz V The State and others** (2017 SCMR 1874), **The State/ANF V Muhammad Arshad** (2017 SCMR 283), **Muhammad Rasool V The State** (2022 SCMR 1145), **Rehmatullah V The State (A.N.F.)** (2022 YLR 1639), **Raja Ehtisham Kiyani V The State** (2022 SCMR 1248) and **Zafar V The State** (2008 SCMR 1254).

12. 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.

13. 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 police on 28.05.2013 when narcotics weighing 395Kgs were recovered from the Suzuki vehicle in which they were all sitting. Those narcotics according to the evidence of the complainant were taken to the PS. However since the complainant was not subject to cross examination as he died before he could be cross examined by the defence counsel we have discarded his evidence. According to PW 2 Sher Muhammed who was present at the time when the narcotics were recovered from the appellant and his evidence is on the same lines as the discarded evidence of the complainant the narcotics when they returned to the PS were kept in the Malkhana for safe keeping. PW 4 Ashraf Ali states that he took the recovered narcotics to the chemical examiner the next day on 29.05.2013. However neither was the malkhana in charge examined to prove that the narcotics had indeed been deposited in the malkhana after their recovery nor was any malkhana entry exhibited to show that the recovered narcotics had ever been kept in the malkhana and thus it cannot be said with certainty where the narcotics actually were on the night of 28.05.2013 as there has been a break in the chain of custody of the narcotics and as such it cannot be ruled out that the narcotics were not tampered with during the night of 28.05.2013. 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 was sent for chemical examination as it appears that the narcotics were not accounted for during the night and early hours of 28/29.05.2013

during which time they could have been tampered with which renders the chemical report 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. 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 prove safe custody of the narcotic 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 appeal is allowed. The appellants shall be released unless wanted in any other custody case.

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