

Narcotics : No Safe Custody

391

Latest Judgment - Quacha and Javed Iqbal

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

Before:

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

Cr. Jail Appeal No.D-89 of 2019

Altaf Hussain

Versus

The State

Appellant : Altaf Hussain	Through Mr. Muhammad Jameel Ahmed, Advocate
Respondent : The State	Through Mr. Abdul Waheed Bejarani Asst. Prosecutor General, Sindh
Date of hearing:	14.03.2023
Date of judgment:	14.03.2023

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- This criminal appeal is directed against the judgment dated 09.05.2019, passed by learned 1st Additional Sessions Judge Shaheed Benazirabad, in Special Narcotics Case No.673 of 2016, arising out of Crime No.48 of 2016, registered at Police Station Punhal Khan Chandio, 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 life imprisonment and to pay fine of Rs.1,00,000/-. In case of default in payment of fine he was ordered to suffer simple imprisonment for 01 year more. However, the benefit of Section 382-B Cr.P.C. was also extended to the accused.

2. The brief facts of the prosecution case as narrated in FIR No.48 of 2016, registered at Police Station Punhal Khan Chandio are that on

12.11.2016 SIP Asghar Ali Awan, SHO of P.S of the said police station alongwith his subordinate police staff vide daily diary entry No.15 left police station for patrolling at 1900 hours. During patrolling when they reached on link road leading from Piaro Mour to Karero Pir, they saw one person having cloth bag in right hand appeared from western side and arrived at road. That person became confused on seeing police and tried to escape towards backward direction. However that person was encircled and apprehended by PC Ilam Din after chase of 10/15 paces. The cloth bag was secured from possession of apprehended person who disclosed his name as Altaf Hussain son of Ali Gohar Panhwar resident of village Adam Khan Panhwar District Jacobabad. The cloth bag secured from possession of apprehended person was found containing 10 packets and in each packet, two large pieces of charas wrapped in blue colour plastic were lying. The pieces of charas were having image of star. The pieces of charas were weighed and found to be 10250 grams, which was packed in same plastic wrappers and bag which was sealed as sample for analysis. Two currency notes of Rs.500/- and Rs.100/- were also recovered from side pocket of his shirt. The accused disclosed that he used to sell charas. The accused was arrested and such mashirnama of arrest and recovery was prepared and thereafter, the accused as well as the recovered narcotic substance were brought at police station where FIR was registered.

3. After usual investigation, the case was challaned and sent-up for trial. The appellant plead not guilty to the charge framed against him and claimed to be tried.

4. In order to prove its case, 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 allegations by pleading innocence; he, however, did not examine himself on oath or any one in support of his defense case.

5. On conclusion of trial, learned Trial Court found the appellant to be guilty for the above said offence and then convicted and sentenced him as set out earlier in this judgment, which is impugned by the appellant before this Court by way of instant appeal.

6. 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.
7. Learned advocate for appellant has mainly contended that prosecution case is highly doubtful; that despite the place of incident was located at busy spot, yet, none from general public was picked up and joined as mashir to attest the arrest and recovery; there are material contradictions in prosecution evidence, hence it cannot be relied upon; that as per prosecution case the narcotic substance was sent for Chemical analysis through PC Nawab Keerio; however, he was not examined to show the safe transportation and delivery of the same, hence tampering with the case property could not be ruled out and that for all or any of the above reasons the appellant should be acquitted of the charge by extending him the benefit of the doubt.
8. The learned Assistant Prosecutor General, Sindh fully supported the impugned judgment. He contended that the prosecution had proved its case beyond a reasonable doubt and as such since the appeal was without merit it be dismissed.
9. We have carefully heard the learned counsel for the parties and gone through the entire evidence. At the very outset, one of the crucial requirements of a narcotic's case is that the safe custody and safe transmission of a narcotic from its recovery until the time it has been delivered to the chemical examiner must be proven. In this case, we find that the prosecution not been able to prove the safe custody of the narcotic from the time of its recovery as well as its safe transmission to the chemical analysis which leads to the possibility that the narcotic has been tampered with and as such renders the chemical report unreliable and of no evidentiary value. It has been held by the Supreme Court that in proving the safe recovery and safe transmission of the narcotic to the chemical analysis the following steps must be proven;
 - i. Evidence that the narcotic was recovered from the accused. This will entail the evidence being given of the officer who made the recovery and mashir of recovery and

- ii. Evidence that the recovered narcotics was placed in the Malkhana or some other secure place for safe keeping. This will entail the evidence being given of the malkhana in charge to this effect or at a minimum the exhibiting of the Malkhana entry and
- iii. That the Malkhana incharge should give the narcotic via evidence or entry to a police official to take the narcotic in sealed condition for chemical analysis and that such officer who took the narcotic to the chemical examiner give evidence to that effect.

10. Once all the above steps have been completed, safe custody and safe transmission of narcotics will most likely be proven. In this case, the recovery was made by PW-1 Asghar, who according to his evidence deposited the recovered narcotics in the malkhana. However, he states that he gave the recovered narcotics to WHC Abdul Wahab Jagirani to place in the malkhana who was not examined and was the malkhana incharge. The prosecution also failed to produce the malkhana entry whereby the narcotic was placed in the malkhana. As such it is apparent that the prosecution has failed to prove the safe custody of the narcotics as during its one day period before it was sent for chemical examination the narcotics might have been tempered with.

11. With regard to safe transmission of the narcotics this was done on a day after the recovery by PW-3 Nawab Keerio. However, there is some doubt as to whether it was in fact PW-3 who took the narcotics to the chemical examiner. This is because PW-1 in his evidence stated that the narcotic was taken by PC Nawab Khan and not Nawab Keerio. The complainant, who was also the I.O of the case, also failed to record Section 161 Cr.P.C statement of Nawab Khan for clarity. The chemical report also states that the narcotic was deposited for chemical analysis by Nawab Khan and not Nawab Keerio and as such even in this regard there is some doubt as to the identity of the person who took the narcotics to the chemical examiner for analysis, as such, there are doubts in this regard as well. When confronted with this proposition, learned A.P.G could not dispute the fact that neither the malkhana incharge had been examined nor malkhana entry had been produced before the Court in evidence. Although he submitted that Nawab Keerio was in fact Nawab Khan.

12. Under these circumstances, we find that the safe custody of the narcotics has not been proven and safe transmission of the narcotics also to some extent is doubtful which means that the narcotic might have been tampered with before it reached the chemical analyst and as such this renders the chemical report unreliable and of no legal value. In this respect, reference can be made to the cases of **Qaisar V State** ((2021 SCMR 363) and **Javed Iqbal V State** (2023 SCMR 139).
13. Thus, for the above stated reasons, we hold that the prosecution has failed to prove its case against the appellant beyond a reasonable doubt, therefore, while extending the benefit of doubt to the appellant the appeal is allowed and the conviction and sentence recorded by the trial court are set aside and the appellant is acquitted of the charge. He shall be released forthwith if not required in any other custody case.
14. The appeal is disposed of in the above terms.