

IN THE HIGH COURT OF SINDH, KARACHI

Present:

*Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Arshad Hussain Khan,*

Criminal Appeal No.132 of 2022.

Appellant: Waqas Raza @ Ali S/o. Muhammad Shoukat through Mr. Iftikhar Ahmed Shah, Advocate.

Respondent: The State through Mr. Ali Haider Saleem, Additional Prosecutor General Sindh.

Date of hearing: 07.12.2022.

Date of Announcement 13.12.2022.

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellant Waqas Raza @ Ali S/o. Muhammad Shoukat has preferred this appeal against the judgment dated 29.01.2022 passed by the Model Criminal Trial Court/Additional District & Sessions Judge-I, Karachi East in Special Case No.1444 of 2021 arising out of Crime No.104 of 2021 U/s. 6/9-C of Control of Narcotic Substance Act, 1997 registered at P.S. Awami Colony, Karachi whereby the appellant was convicted and sentenced to Life Imprisonment with fine of Rs.200,000/-. In failure to pay the fine he was ordered to undergo imprisonment for six months more. Benefit of section 382-B Cr.P.C. was also extended to the appellant.

2. The facts of the prosecution case are that on 15.02.2021 at about 0140 hours, SIP Subhan Ali of PS Awami Colony was on patrolling duty with the subordinate staff. During patrolling he received spy information that at Awami Colony near N-5 Bus Stop, Karachi one person was having huge quantity of chars in plastic bags and he was about to hand over the same to another person. On receiving such information, he with police party and spy informer rushed to pointed place at about 0140 hours where they found one person on the pointation of informer, apprehended him and inquired his name to which he

disclosed his name as Waqas Raza @ Ali son of Muhammad Shoukat. He was carrying one plastic bag in which 26 small packets lying in yellow color shopper and six big packets wrapped in yellow color tape were lying containing chars. The property was weighed on digital scale and the weight was found to be 20 Kilograms. The complainant sealed the property on the spot, prepared seizure memo in presence of mashirs and then brought the accused and case property to Police Station where he lodged FIR under section 6/9-C of CNS Act.

3. After completion of investigation I.O. submitted charge sheet against the arrested appellant accused Waqas Raza @ Ali to which he pleaded not guilty and claimed trial.

4. The prosecution in order to prove its case examined 03 witnesses and exhibited various documents and other items. The appellant in his S.342 Cr.PC statement claimed false implication by the police and gave evidence on oath and called 2 DW's in support of his defence case.

5. After hearing the parties and appreciating the evidence on record the trial court convicted the appellant and sentenced him as set out earlier in this judgment, hence, the appellant has filed this appeal against his conviction.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 29.01.2022 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel for the appellant argued that the appellant was completely innocent and that the narcotics had been foisted on him by the police because he had a financial dispute with another police men named Adil; that there were material contradictions in the evidence of the PW's and as such their evidence could not be safely relied upon; neither safe custody nor safe transmission of the narcotic had been proven which meant that the chemical report was of no value to the prosecution and as such the appellant should be acquitted of the charge by being extended the benefit of the doubt. In support of his contentions he placed reliance on the cases of **Qaiser and another v. The**

State (2022 SCMR 1641) and an unreported judgment of this Court in Criminal Appeal No.126 of 2021 dated 03.11.2022 **Islam and another v. The State**.

8. Learned Additional Prosecutor General Sindh has fully supported the impugned judgment and has submitted that the accused was arrested on the spot and the narcotics were recovered from him; that safe custody had been proven and that there was a positive chemical report and as such the prosecution had proved its case beyond a reasonable doubt and as such the appeal be dismissed. In support of his contentions he placed reliance on the cases of **Ibrarullah v. The State** (2021 SCMR 128), **State through Director ANF Peshawar v. Fakhar Zaman** (2019 SCMR 1122) and **Mushtaq Ahmad v. The State and another** (2020 SCMR 474).

9. We have heard the arguments of the learned counsel for the appellant and learned Additional Prosecutor General Sindh and have also gone through the entire evidence which has been read out by the learned counsel for the appellant and the impugned judgment with their able assistance.

10. 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 from the accused 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 huge as the principle remains the same. In this case the appellant was arrested by the police on 14.02.2021 when narcotics weighing 20-kg was recovered from his person. Those narcotics initially were recovered by PW1 Subhan Ali at the time of the arrest of the accused who initially states in his evidence that he handed them over to PW 3 Mansoor Ali Kehar who was the IO although in cross examination he states that he handed the narcotics over to the head Mohrar for safe keeping. PW 2 Rana Sohail who was the mashir of arrest and recovery states in his evidence that he does not know who the narcotics were handed over to at the PS after their recovery and return to the PS. PW 3 Mansoor Ali Kehar who was the IO of the case states in his evidence that he deposited the recovered narcotics with the chemical examiner on 16.02.2021 although the chemical report states that the narcotics were handed

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over by Zahoor Ahmed. It is important to note that the Malkhana in charge was not examined and no malkhana entry showing the deposit of the narcotics in the malkhana was exhibited so it raises the question of where the narcotics were actually kept from the time they were recovered to the time they were sent for chemical examination. Importantly, Zahoor Ahmed who is named in the chemical report as the person who delivered the narcotics to the chemical laboratory for testing on 16.02.2021 was also not examined. This belies the evidence of PW 3 Mansoor Ali Kehar who states that he took the narcotics to the chemical laboratory for examination. PW 3 Mansoor Ali Kehar tries to rescue the situation by stating in his cross examination that he accompanied Zahoor Ahmed however he has not been able to produce any entry or other evidence to this effect. Another interesting aspect of this case is that photo's of the accused have been exhibited along with PC Zeesham and SHO Humayan before a huge pile of the allegedly recovered narcotic which completely belies any safe custody of the narcotic after its recovery. Based on the above analysis of the evidence the prosecution by failing to examine the malkhana in charge where the recovered narcotic was allegedly kept over night, failing to produce any malkhana entry regarding the narcotic being deposited in the malkhana over night, its failure to examine Zahoor Ahmed who took the narcotic from the PS for chemical examination the next day and the fact that photo's of the unsealed narcotic have been exhibited clearly shows that the prosecution has **failed to prove** both safe custody of the narcotic and safe transmission of the narcotic to the chemical laboratory and as such the chemical report is of no legal value.

11. 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 effected 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

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(2021 SCMR 451), Zubair Khan v. the State (2021 SCMR 492)
and Gulzar v. the State (2021 SCMR 380)."

12. We also note that it would be quite difficult for the appellant to carry around with him 20KG's of narcotics which may indicate that the narcotics have been foisted on him especially keeping in view that this was the appellants consistent stance in his cross examination and S.342 Cr.PC statement, evidence on Oath and the two Independent DW's which he produced who gave evidence that the appellant was arrested from a hotel and as such the defence case cannot be simply brushed aside.

13. Thus for the reasons mentioned above we find that the prosecution has **NOT proved** its case against the appellant beyond a reasonable doubt especially in terms of its failure to prove safe custody of the narcotic from the time when it was allegedly recovered from the appellant until the time it was sent for chemical analysis and as such the possibility of the narcotic being tampered during this period cannot be ruled out. Thus, 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 shall be released forthwith unless he is wanted in any other custody case.

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