

THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Yousuf Ali Sayeed &
Mr. Justice Adnan Iqbal Chaudhry.

Cr. Appeal No. 437 of 2020

Appellant : Athar Ellahi through Mr. Muhammad Ali Shahwani advocate.

Respondent : The State through Mr. Khadim Hussain Additional Prosecutor General Sindh.

FIR No. 12/2020
u/s 6 & 9(c) CNS Act, 1997
P.S. Super Market, Karachi.

Dates of hearing : 30-06-2021 & 01-07-2021

JUDGMENT

Adnan Iqbal Chaudhry J. - This appeal under section 48(1) of the Control of Narcotic Substances Act, 1997 [CNS Act] is from judgment dated 01-10-2020 passed by the I-Additional Sessions Judge, Karachi Central, acting as Special Court under the CNS Act in Special Case No. 177/2020, whereby the Appellant was convicted for the offence under section 6 read with section 9(c) of the CNS Act, and sentenced to RI of 4 years, 6 months, plus fine of Rs. 20,000/- and in default of the latter, to a further SI of 5 months. He was extended the benefit of section 382-B CrPC.

2. Per FIR No. 12/2020, on 14-01-2020, the police party on patrol received information from a spy that a youngster was present at the Lyari River bank, next to a football ground, opposite Ilyas Goth, Liaquatabad, with the intent of selling drugs; that on reaching the spot at 12:30 hours, the Appellant was seen standing in a suspicious condition carrying a plastic shopping bag; that a search of the shopping bag revealed two pieces of *chittar* shaped charas, found to

be weighing 1040 grams; that the narcotic was seized and sealed on the spot and the Appellant was arrested; that Rs. 150 cash was also seized from him; and that due to non-availability of private witnesses, the police constables present witnessed the seizure and arrest.

3. The entire 1040 grams of the substance seized was sent for chemical examination. Per the report of the Chemical Examiner (Exhibit 6/F), the substance tested positive for charas. The Appellant was therefore charged with the offence under section 6 read with section 9(c) of the CNS Act, to which he pleaded not guilty. After a regular trial he was convicted and sentenced as mentioned first above.

4. Learned counsel for the Appellant submitted that the Appellant was picked up by the police elsewhere prior to the date of the alleged arrest, and the charas was planted on him; that the search of the Appellant was contrary to section 103 CrPC as no private witness was associated, making the recovery doubtful; that Entry No. 3/2020 (Exhibit 4/A) recording the deposit of the case property at the *maalkhana* is dated 16-04-2020; that even if ASI Muhammad Arif (PW-2) is to be believed that he took the case property from the *maalkhana* for chemical examination on 15-01-2020, it was still not delivered to the Chemical Examiner until 16-01-2020, and thus the safe custody of the case property was not established.

On the other hand, the learned APG Sindh submitted that the police had no enmity with the Appellant so as to frame him; that in any case, no evidence was led by the Appellant to prove the allegation that he was arrested earlier and elsewhere; that the search of the Appellant was lawful as section 103 CrPC stands excluded by section 25 of the CNS Act; that the date mentioned in Entry No. 3/2020 (Exhibit 4/A) is 16-01-2020 and not 16-04-2020; and that the evidence should be considered as whole.

5. Heard the learned counsel and reappraised the evidence.

6. It is alleged that the narcotic, 1040 grams of charas, was seized on 14-01-2020 at 12:30 hours from a shopping bag carried by the Appellant (Exhibit 3/B). ASI Muhammad Arif (PW-2) deposed that the sealed parcel containing the charas was deposited by him with the *maalkhana* the same day (14-01-2020) *vide* Entry No. 3/2020. Learned counsel for the Appellant had drawn attention to the fact that the date of that Entry No. 3/2020 (Exhibit 4/A), which is hand-written, appears to be "16-4-2020". The learned APG had submitted that such date was in fact "16-1-2020", and the figure "1" appeared to be a "4" owing to the hand-writing of the scribe, which was reinforced by the fact that the very next entry in the same register, made for another case, is dated "21-01-2020". We are inclined to agree with the learned APG that the date of Entry No. 3/2020 (Exhibit 4/A) is "16-01-2020" and not "16-04-2020". But then, even if the case property was deposited with the *maalkhana* on 16-01-2020, that still contradicts the testimony of ASI Muhammad Arif (PW-2) that he deposited the case property with the *maalkhana* on 14-01-2020. On cross-examination that witness had further stated that the I.O. had taken the case property from the *maalkhana* for chemical examination the next day i.e. on 15-01-2020. The I.O. Ali Nawaz (PW-4) had also given the same date. However, the date of receipt of the case property mentioned by the office of the Chemical Examiner on Exhibit 6/E and Exhibit 6/F is that of 16-01-2020, thereby contradicting not only the testimony of PW-2 and PW-4, but also the *maalkhana* Entry No. 3/2020 (Exhibit 4/A). Thus, the safe custody of the charas allegedly seized from the Appellant on 14-01-2020, and its safe transmission to the Chemical Examiner was never established by the prosecution. Its whereabouts prior to 16-01-2020 when it was received by the Chemical Examiner, were elusive. It has been held by the Supreme Court in *The State through Regional Director ANF v. Imam Bakhsh* (2018 SCMR 2039) that: "The prosecution must establish that the chain of custody was unbroken, unsuspecting, indubitable, safe and secure. Any break in the chain of custody or lapse in the control of possession of the sample will cast doubts on the safe custody and safe transmission of

the sample(s) and will impair and vitiate the conclusiveness and reliability of the Report of the Government Analyst, thus, rendering it incapable of sustaining conviction.”

7. There is yet another aspect of the matter. The arrest of the Appellant as alleged by the prosecution was also dubious. While the FIR and the memo of arrest (Exhibit 3/B) stated that the Appellant was arrested at the *“Lyari River bank, next to a football ground, opposite Ilyas Goth, Liaquatabad”*, the covering letter of the I.O. under which he had sent the case property to the Chemical Examiner (Exhibit 6/E) gave the place of occurrence as *“near Javed Nihari galli, Block 4, Liaquatabad”*, a completely different location. Also, as per the sketch of the place of occurrence (Exhibit 6/B), the Appellant was standing next to a football ground within the Lyrai River dry-bed, an unpopulated area, from where he could have easily spotted the approaching police party from a sufficient distance, and yet he did not try to flee. That reinforces the doubt as to the place and manner of his arrest.

8. In view of the foregoing, where evidence led by the prosecution raised suspicions as to the safe custody and safe transmission of the charas allegedly seized from Appellant; and where the evidence of the place of arrest was contradicted, or in the very least dubious, the prosecution has not been able to prove beyond reasonable doubt the charge of possession of the narcotic against the Appellant. Consequently, the conviction of the Appellant *vide* judgment dated 01-10-2020 passed by the Special Court (CNS) in Special Case No. 177/2020, is set aside, and the Appellant/accused Athar Ellahi s/o Akhtar Elahi is acquitted in FIR No. 12/2020 lodged at PS Super Market, Karachi. He shall be released from jail forthwith if his custody is not required in any other case.

JUDGE

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