

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Criminal Jail Appeal No. D-19 of 2020

Present:

Mr. Justice Khadim Hussain Tunio
& Mr. Justice Yousuf Ali Sayeed.

Appellant : Muhammad Asghar, through Shakir
Nawaz Shar, Advocate.

Respondent : The State through Abrar Ali Khichi,
APG

Date of hearing : 03.03.2021

Date of decision : 03.03.2021

JUDGMENT

YOUSUF ALI SAYEED, J. Per the prosecution, the Appellant was apprehended while standing at Chang Mour Curve on the Hyderabad By-pass on 30.5.2019 at 3:00 p.m. by a police party led by SIP Zahoor Ahmed (the “**Complainant**”) and otherwise comprising of HC Muhammad Alam, PC Muhammad Hassan, PC Muhammad Usman and DHC Muhammad Yaqoob, all of whom were said to have been deployed from PS Hatri for the purposes of patrolling and checking. It is said that upon a personal search being carried out on the spot, a white colour bag was recovered from the possession of the Appellant, containing 10 packets of charas, each weighing 1 kg, out of which 7 packets were emblazoned with the picture of a bird encircled by the words “BOSTAN SAMARQAND”, whereas the remaining three packets were wrapped in yellow colour tape, with that case property being sealed for onward transmission to the Chemical Examiner and a Memo as to the arrest and seizure being prepared by the Complainant in the presence of two Mashirs, namely HC Muhammad Alam and PC Muhammad Hassan. A First Information Report, bearing Crime Number 62 of 2019 (the **FIR**), was then registered in the matter by the Complainant at P.S. Hatri at 4:30 PM on the same day.

2. Following the usual investigation, the matter was challaned and sent up before the 2nd Additional Sessions /Special Judge (CNS), Hyderabad (the “**Trial Court**”), where the Appellant came to be charged in the ensuing Special Case, bearing No. 182 of 2019, under S.9(c) of the Control of Narcotic Substances Act, 1997 on account of a contravention of Section 6 thereof, to which they pleaded not guilty and claimed trial.

3. Of the several officials said to have comprised the police party, the Prosecution examined only the Complainant (PW-1) and one of the Mashirs to the arrest and recovery, namely HC Muhammad Alam (PW-2), with the Investigating Officer, namely SIP Sain Bux (PW-3), being the final witness. The Complainant produced the extract of Entries Nos. 14 and 16 on one page at Ex.4-A, the Memo of Arrest and Recovery at Ex.4-B, the FIR at Ex.4-C, and the extract of Entries Nos. 32 and 33 at Ex.4-D respectively, while HC Muhammad Alam, who also acted as the Mashir to the IO’s visit of the place of the wardat produced the Memo in that regard as Ex.5-A, whereas the IO produced Entry No. 48 of register No.19 at Ex. 6-A, extract of entries No. 23 and 26 as Ex.6-B, letter of sending the property to the Chemical Examiner Office as Ex. 6-C and Chemical Report as Ex.6-D respectively.

4. Based on the depositions of those witnesses and the evidence produced by them, the Trial Court concluded that the prosecution had successfully proven the charge against the Appellant, with a finding of guilt accordingly being recorded against him in terms of the judgment rendered on 13.02.2020 (the **Impugned Judgment**), whereby he was sentenced to suffer rigorous imprisonment for a period of 5 years and to pay a fine of Rs.50,000/- and in case of failure, to suffer simple imprisonment for 1 year, with the benefit of Section 382-B extended. Being aggrieved, the Appellant has preferred the instant Jail Appeal through the Superintendent, Central Prison, Hyderabad.

5. Learned counsel for the Appellant assailed the Impugned Judgment, contending that the so-called facts narrated in the FIR were a fabrication, designed to falsely implicate the Appellant, and that the evidence produced was insufficient for the Trial Court to have recorded a conviction, with the prosecution having failed to establish safe custody as well as transmission of the samples to the office of the Chemical Examiner. He submitted that the case of the prosecution was thus marred by gaps and defects and under such circumstances there was no scope for a conviction.

6. Having considered the matter in light of the record, we have observed that although the police party is said to have embarked at 2:00 PM for the express purpose of patrolling and checking, yet without any definite information it transpired that an hour later the only person admittedly apprehended and searched was the Appellant, who albeit a resident of Karachi was apparently standing alone peddling drugs at a remote location on the outskirts of Hyderabad, which does not appeal to reason and good sense, and assumes significance due to the apparent conflict between the depositions of PW-1 and PW-2 as to the presence of private persons at place of arrest at the relevant time, who could have acted as independent witnesses. Indeed, SIP Zahoor Ahmed stated that no private persons were available at the scene of the offence, hence no one could be asked to act as a mashir, whereas HC Muhammad Alam stated that they requested passers-by to act as mashirs, but they refused to do so. Even the Appellant's Statement under Section 161 Cr. P.C. appears discrepant, as it predates the date of incident and arrest. Suffice it to say, viewed in juxtaposition, these factors serve to cast doubt on the veracity of the prosecution's case.

7. Furthermore, while the prosecution witnesses furnished their testimony as to the search and arrest of the Appellant and the investigative steps said to have been taken thereafter, the chain of custody remains shrouded in uncertainty as nothing was brought on record to demonstrate where the case property was kept between 30.05.2019 and 03.06.2019, prior to being sent for analysis, and neither the officer in charge of the Malkhana nor the official who supposedly conveyed the samples to the office of the Chemical Examiner were called upon to depose. Indeed, while SIP Zahoor Ahmed said that he sealed the case property and handed over the same to SIP Sain Bux, but went on to say that he himself then took the case property to the chemical laboratory on 03.06.2019, SIP Sain Bux said that it was he who sent the property to the chemical examiner, whereas the Chemical Examiner's Report reflects that the property had been received from SHO PS Hatri through PC Shahnawaz, who was never examined as witness. Needless to say, for the Chemical Examiner's Report to have real probative value, the sanctity of the chain of custody is absolutely imperative, and we are fortified in this regard by the Judgment of the Honourable Supreme Court in the cases reported as The State through Regional Director ANF v. Imam Bakhsh and others 2018 SCMR 2039, as well as a more recent Judgment in Criminal Appeal No.184 of 2020, titled Mst. Sakina Ramzan v. The State, where it was held that:

“The chain of custody or safe custody and safe transmission of narcotic drug begins with seizure of the narcotic drug by the law enforcement officer, followed by separation of the representative samples of the seized narcotic drug, storage of the representative samples and the narcotic drug with the law enforcement agency and then dispatch of the representative samples of the narcotic drugs to the office of the chemical examiner for examination and testing. This chain of custody must be safe and secure. This is because, the Report of the Chemical Examiner enjoys critical importance under CNSA and the chain of custody ensures that correct representative samples reach the office of the Chemical Examiner. Any break or gap in the chain of custody i.e., in the safe custody or safe transmission of the narcotic drug or its

representative samples makes the Report of the Chemical Examiner unsafe and unreliable for justifying conviction of the accused. The prosecution, therefore, has to establish that the chain of custody has been unbroken and is safe, secure and indisputable in order to be able to place reliance on the Report of the Chemical Examiner.”

8. In the matter at hand, it is apparent that the prosecution has failed to establish the necessary links of the chain so as to demonstrate that the alleged narcotic substance was kept in safe custody after the recovery and safely transmitted to the office of the Chemical Examiner without being tampered with or replaced while in transit, as was necessary to drive home the charge against the Appellant.

9. When faced with the aforementioned discrepancies in the prosecution evidence, the learned APG was unable to put forward any argument to controvert the same or support the finding of guilt recorded in the impugned Judgment.

10. As such, it is for these reasons that we had determined upon culmination of the hearing that the Impugned Judgment could not sustain, hence had made a short Order dated 03.03.2021 in open Court whereby the Appeal was allowed, with the Appellant being acquitted of the charge and the conviction and sentence awarded to him being set aside.

JUDGE

Hyderabad
Dated _____

JUDGE