

# IN THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No. 219 of 2020

*Before:*

Mr. Justice Mohammad Karim Khan Agha  
Mr. Justice Khadim Hussain Tunio

Appellants: Arqam son of Salahuddin and Aziz-ur-Rehman son of Bahram Khan through Mr. Saifullah, advocate.

Respondent: The State through Mr. Abrar Ali Khichi, Additional Prosecutor-General, Sindh.

Date of hearing: 18.03.2022  
Date of announcement: 22.03.2022

## J U D G M E N T

**KHADIM HUSSAIN TUNIO, J-** Through captioned criminal appeal, appellants Arqam and Aziz-ur-Rehman have challenged the judgment dated 21.02.2020 (*impugned judgment*) passed by the leaned 1<sup>st</sup> Additional Sessions Judge/ Additional Model Criminal Trial Court (MCTC)/Special Court (CNS) Karachi-Central in Special Case No. 544/2019 (*Re: The State v. Arqam Salahuddin & another*), culminated from FIR No. 296/2019 registered at P.S. New Karachi, under section 6/9(c), Control of Narcotic Substances Act (CNSA) 1997. Through the impugned judgment, appellants were convicted under Section 265-H(ii) Cr.P.C. for the offences u/s. 6/9(c) of CNSA and were sentenced to suffer rigorous imprisonment for 04 years 06 months and ordered to pay fine of Rs.20,000/- each, defaulting whereof they were ordered to suffer S.I. for 04 months more. Benefit of Section 382(b) Cr.P.C. was extended to them.

2. Briefly stated, the prosecution case is that on 11.10.2019 at about 2230 hours, a police party from Police Station New Karachi headed by ASI Rasheed Muhammad arrested Arqam and Aziz-ur-Rehman (*appellants*), securing 1020 grams of chars and Rs.500/- from Arqam and 1030 grams of chars along with Rs.700/- from Aziz-ur-Rehman, whereafter memo of arrest and recovery was prepared. Then, both the

appellants alongside the case property were brought back to the police station and the FIR was lodged.

3. Following usual investigation by the police, a challan was submitted against the appellants. Then, a formal charge was framed against them by the trial Court to which they pleaded not guilty and claimed to be tried. In order to substantiate its case, prosecution examined PW-1 ASI Rasheed Muhammad, PW-2 PC Muhammad Mithal, PW-3 SIP Faiz Muhammad and PW-4 ASI Saeed Ahmed. They produced a number of documents and other items in evidence which were duly exhibited. Statements of accused were recorded under section 342 Cr.P.C wherein they denied the allegations levelled against them in totality and claimed their false implication. They also examined themselves on oath under section 340(2) Cr.P.C. Appellants Arqam examined DW Ali in his defence and appellant Aziz-ur-Rehman examined DWs Bahram Khan and Mushtaq Ahmed in his defence. Thereafter defence side was closed.

4. Learned trial Court, after considering the material available before it and hearing the learned counsel for the respective parties, handed down the impugned judgment and sentenced the appellants as stated supra.

5. Learned counsel for the appellants has contended that name of complainant ASI Rasheed Muhammad has not been disclosed in Departure Entry No. 46 through which the police party initially left; that Entry No. 55 through which the complaint subsequently left finds mention neither in the FIR nor in the memo of arrest and recovery; that the presence of private persons at the place of scene has been admitted in FIR and Memo of Arrest and Recovery; that different weight of recovered chars has been shown in the memo and FIR and Chemical Examiner's Report; that malkhana Incharge has not been examined; that there is three days delay in sending the case property to the Chemical Examiner; that there are material contradiction in the evidence of the prosecution witnesses; that none from public has been examined as a witness; that safe custody of the narcotic substances has not been established by the prosecution; that the appellants should be acquitted by extending them

the benefit of the doubt. In support of his arguments, learned counsel has placed his reliance on case law reported as 1995 SCMR 1345 (*Tariq Pervaiz v. The State*).

6. On the other hand, learned Additional Prosecutor General Sindh supported the impugned judgment while submitting that four witnesses have been examined by the prosecution; that there is consistency between the evidence of PW-1 and PW-2; that there are no major contradictions in their evidence which can safely be relied upon; that no private witness is available at the place of scene; that the chemical examiner's report was positive and as such the appeal should be dismissed. He has placed his reliance on the case law reported as 2021 SCMR 2005 (*Shafaullah Khan v. The State & another*), 2020 SCMR 474 (*Mushtaq Ahmed v. The State & another*) and 2020 SCMR 1000 (*Asmat Ali v. The State*).

7. We have heard the arguments advanced by the learned counsel for the appellant as well as learned Additional Prosecutor-General, Sindh and have gone through the entire evidence available on record with their assistance.

8. It is a matter of record that the police party of PS New Karachi initially left for patrolling through entry No. 46 dated 11.10.2019 at 2000 hours. This party was then recalled to the police station at 2205 hours when the complainant joined the said police party for patrolling. The incident took place at 2230 hours on a Service Road near Kanwal Ultrasound Sector 11-K when they saw two suspicious individuals who started to flee upon seeing the police. They were apprehended and both of them carried a blue shopper, each. Aziz-ur-Rehman's blue shopper was searched wherefrom four packets of chars were recovered and Arqam's shopper also contained the same contents. These packets were weighed on an electronic scale and the chars recovered from Arqam came out to be 1020 grams whereas the one recovered from Aziz-ur-Rehman came out to be 1030 grams. The whole property was sealed and brought back to the police station where arrival entry No. 56 was kept on the record. Upon perusing the depositions of the witnesses, we found material

contradictions in their evidence. ASI Rasheed Ahmed, being the complainant, deposed that he had also left for patrolling through entry No. 46, however upon scrutiny of the said entry, his name is nowhere to be found. His stance is further contradicted through entry No. 55 which states that he recalled the police party to join them at 2205 hours. Such entry also does not find any mention in the FIR, neither in the memo of arrest and recovery. Entry No. 55 has again been contradicted by PC Muhammad Mithal who deposed that he had left with ASI Rasheed Ahmed for patrolling at 2000 hours even though entry No. 46 clearly states that he had left with PC Tasawar and DPC Qais Baboo. Moreover, the complainant ASI Rasheed and mashir of arrest and recovery PC Mithal both deposed that the place of arrest and recovery was a thickly populated area, however they have both been contradicted by the investigation officer SIP Faiz who deposed that the place was not a thickly populated one. The complainant deposed that he had placed the case property in the malkhana through the duty officer who at the time, as per entry No. 46 was ASI Allah Ditta, although he produced no malkhana entry in that regard. ASI Allah Ditta has also not been examined by the prosecution, instead ASI Saeed Ahmed was examined being a well-conversant of his witness who produced the malkhana entry while deposed that the same was kept by PC Ibrahim. PC Ibrahim was not examined either, therefore not only was PC Allah Ditta not examined to ascertain the genuineness of the entry nor was the official who drafted the entry. Furthermore, the recovery was made on the 11<sup>th</sup> and the chars was received by the chemical examiner on the 15<sup>th</sup>. Prosecution has been unable to prove the safe custody of the case property in this intervening period. With prosecution's failure in examining the in-charge of said malkhana or the head-*moharrar*, there is no way to ascertain whether the property was actually kept in the malkhana or not and if not, safe custody from recovery to dispatch to the chemical examiner cannot be proven especially when the same was delayed by three days. By failing to prove the safe custody of the recovered contraband, the same could not be used against the appellant as held by the Hon'ble Apex Court in the case of

MST. SAKINA RAMZAN v. THE STATE (2021 SCMR 451) while observing that:-

*“...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.”*

*(emphasis supplied)*

9. All these aspects of the case, coupled with the observations made above create doubts in the prosecution case. The principle of benefit of doubt needs little mention which has time and again been reiterated by the Hon'ble Apex Court such as in the cases of *Faizan Ali v. The State (2019 SCMR 1649)* and *Kamran Shah v. The State (2019 SCMR 1217)*. The Hon'ble Apex Court in the case of *TARIQ PERVEZ v. THE STATE (1995 SCMR 1345)* has also observed that even if there is a single infirmity in the prosecution case creating sufficient doubt, the benefit of the same would go to the appellant.

10. Having perused the entire material on the record, we have found that the prosecution has failed to prove safe custody of the narcotics from the time of its alleged recovery until the time it was sent for chemical examination. As such we find that the prosecution has failed to establish the guilt of the appellants beyond reasonable shadow of doubt. Therefore, instant criminal appeal is allowed, the impugned judgment passed by the Additional MCTC Court is also set aside and the appellants are acquitted of the charge. They be released forthwith if not required in any other custody case.

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