

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No. 551 of 2021

Before:

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

Appellant: Javed Khan son of Khan Saeed through Mr. Shamraiz Khan Tanoli, advocate.

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

Date of hearing: 11.03.2022

Date of announcement: 16.03.2022

J U D G M E N T

KHADIM HUSSAIN TUNIO, J- Through captioned criminal appeal, appellant Javed Khan son of Khan Saeed has challenged the judgment dated 28.09.2021 (*impugned judgment*) passed by the learned VIII Additional District & Sessions Judge/Addl: Model Criminal Trial Court, Karachi-West in Sessions Case No. 693/2021 (*Re: The State v. Javed Khan*), culminated from FIR No. 306/2021 registered at P.S. Peerabad, under section 6/9(c), Control of Narcotic Substances Act (CNSA), 1997. Through the impugned judgment, appellant was convicted and sentenced to suffer rigorous imprisonment for four years and six months and to pay fine of Rs.20,000/- (*Rs. Twenty thousand only*), in default in payment whereof to further undergo S.I. for five months more. Benefit of Section 382-B Cr.P.C. was extended to him.

2. Brief facts of the prosecution case are that the complainant SIP Ali Nawaz received spy information regarding sale of chars by a person near Khyber Bazaar, Muhammadi Mohalla, Banaras. Therefore, he along with his staff reached at the pointed place at about 2200 hours and apprehended a person with a plastic shopper in his right hand. On inquiry he disclosed his name as Javed Khan son of Saeed Khan. On his personal

search, complainant also recovered Rs.400/= and appellant's CNIC. Complainant opened the plastic shopper and recovered two packets of chars wrapped in yellow colour tape. He weighed the chars through a digital scale which was 2210 grams. Thereafter, the complainant sealed the case property and prepared memo of arrest and recovery on the spot. Case property was brought to P.S. Peerabad along with the appellant where the FIR was lodged.

3. After usual investigation, challan was submitted against the appellant, whereafter a formal charge was framed against accused by the trial Court to which he pleaded not guilty and claimed trial. In order to substantiate its case, prosecution examined three witnesses namely PW-1 **Complainant SIP Ali Nawaz**, PW-2 **PC Asif Khan** and PW-3 **Inspector Rana Jabbar (I.O.)** Prosecution witnesses also produced a number of documents and other items in evidence which were duly exhibited. Statement of accused was recorded under section 342 Cr.P.C. wherein he denied the allegations made against him and claimed his false implication. He however, neither examined himself on oath nor produced any witness in his defence.

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 appellant as stated supra.

5. Learned counsel for the appellant has contended that no private person has been cited as witness though incident is alleged to have taken place in the Khyber Bazaar; that as per memo none from public was present, however complainant had admitted in his cross examination that private persons were present at the place of incident at the time of commission of incident; that the roznamcha entry regarding depositing the case property in the malkhana has not been produced; that the malkhana in-charge has not been examined; that safe custody of the narcotics substances has not been established by the prosecution; that there are some major contradictions in the evidence of the prosecution witnesses; that place of arrest and recovery is situated in a thickly

populated area, but no independent mashir from the vicinity was made a party to the proceedings and as such for any or all of the above reasons, the appellant should be acquitted by extending him the benefit of the doubt. In support of his arguments, learned counsel has placed his reliance on case law reported as **2021 SCMR 451** (*Mst. Sakina Ramzan v. The State*); **2021 PCrLJ Note 87** (*Nisar Ahmed Shah v. The State*); **2016 PCrLJ 859** (*The State v. Muhammad Sabir alias Sabir*) and **2015 YLR 2163** (*Shafquat Mehmood v. The State*).

6. Conversely, learned Additional Prosecutor General Sindh supported the impugned judgment while submitting that three PWs have been examined by the prosecution; that there are no major contradictions in their evidence which can safely be relied upon; that no private witness is available at place of scene; that the chemical examiner's report was positive and as such the appeal 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. Perusal of the record suggests that the incident took place on 24.04.2021 at about 2200 hours when the appellant was apprehended by the police after being pointed out by the spy informer. He was searched and from his possession, allegedly, 2210 grams of chars were recovered. All the recovered narcotics were sealed on the spot and brought back to the police station along with the appellant. The complainant deposed that he had placed the same in the malkhana, although there is no malkhana entry available in that regard. In his cross-examination, the complainant SIP Ali Nawaz admitted that "*The case property was kept in Malkhana of P.S. I do not remember the name of the incharge of Malkhana. I have not made any entry in the roznamcha regarding keeping the case property in Malkhana. It is correct to suggest that when I handed over the case property to I.O I have not*

made any entry in the roznamcha." Mashir of arrest and recovery PC Asif also admitted in his cross-examination that he does not remember the name of the in-charge of the malkhana. The investigation officer, in his cross-examination, deposed that *"I have not made entry in the roznamcha regarding receiving the case property. I have not produced the entry regarding sending the case property for Chemical Examination and as well as for receiving the case property."* The recovery was made on the 24th and the chars was received by the chemical examiner on the 26th. Prosecution has been unable to prove the safe custody of the case property in this intervening period. With the failure of both these witnesses in producing the entry from register No. 19 or examining the in-charge of said *malkhana*, there is no way to ascertain whether the property was actually kept in the malkhana or not and if not, how could safe custody from recovery to dispatch to the chemical examiner be proven especially when the same was delayed by two days. Therefore, 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.

The facts of the present case reveal that the *chain of custody has been compromised and is no more safe and secure, therefore, reliance cannot be placed on the Report of the Chemical Examiner to support conviction of the appellant.* See Imam Bakhsh¹ and Ikramullah.² For the above reasons we allow this appeal and set aside the conviction and sentence of the appellant. The appellant is directed to be released forthwith, if not required in any other case."

(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 appellant 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 appellant is acquitted of the charge. He be released forthwith if not required in any other custody case.

J U D G E

J U D G E