

**IN THE HIGH COURT OF SINDH, KARACHI**

***Present:***

***Mr. Justice Mohammad Karim Khan Agha J.***  
***Mr. Justice Zulfiqar Ali Sangi J.***

**CRIMINAL JAIL APPEAL NO.05 OF 2021**

Appellant : Akbar Hussain son of Masood Khan  
through Mr. Habib-ur-Rehman Jiskani,  
Advocate.

Respondent : The State through Mr. Muhammad Iqbal  
Awan, Addl. P.G, Sindh.

Date of Hearing : 25.10.2022

Date of Judgment : 31.10.2022

**J U D G M E N T**

**ZULFIQAR ALI SANGI-J.**, Appellant was tried by learned VII Additional District & Sessions Judge, Karachi West in Sessions Case No.67 of 2020, bearing Crime No.518 of 2019 U/s 6/9 (C) of CNS Act, 1997, registered at P.S Saeedabad, Karachi whereby appellant Akbar Hussain was convicted under section U/s 9 (C) of CNS Act, 1997 and sentenced to undergo Rigorous Imprisonment for four (04) years and six (06) Months with fine of Rs.20,000/- (Rupees Twenty Thousand Only), and in default thereof, he was ordered to undergo further Simple Imprisonment for a period of five (05) months more vide judgment dated 26.10.2020. The benefit of section 382-B Cr. P.C was also extended to him. By means of this appeal, appellant has impugned the conviction and sentence awarded to him by the trial court.

2. The brief facts of the prosecution case are that on 06-11-2019 complainant ASI Ghulam Murtaza along with P.C Bilal, P.C Haider and DPC Iftikhar left the police station for patrolling the area in police mobile vide entry No. 37-2000 hours. During patrolling from different places, when they reached KMC Graveyard Barsati Nala, Saeedabad Karachi at 0220 hours, he saw that one person was coming in suspicious condition and was apprehended tactfully. On

inquiry, he disclosed his name as Akbar Hussain s/o Masood Khan and was holding one bag on his shoulder. Due to the non-availability of a private person he made police officials as mashirs and in their presence he took the bag into police custody on its checking he recovered one repeater of black colour along with five live cartridges. He also recovered one packet of charas from the said bag weighing 1070 grams. The recovered case property was sealed at the spot separately and the mashirnama was prepared which was signed by both the mashirs. On reaching the police station separate FIRs under the CNS Act and the Arms Act were registered.

3. After the usual investigation case was challaned before the court having jurisdiction and after completing legal formalities charge against the appellant was framed to which he pleaded not guilty and claimed trial. At the trial, the prosecution examined 03 witnesses including the complainant, mashirs of arrest and recovery and Investigating Officer who produced certain documents in support of the case of the prosecution.

4. The statement of appellant u/s 342 Cr. P.C was recorded wherein he denied the prosecution allegations and pleaded his innocence. He, however, neither examined himself on oath nor led any evidence in his defence. After the trial, the learned trial Court convicted and sentenced the appellant through impugned judgment as stated above. Hence the appellant has filed this appeal against his conviction

5. Learned counsel for the appellant mainly contended that the appellant is innocent and has been falsely implicated in these cases; that charas has been foisted upon him; that there are material contradictions in evidence of prosecution witnesses, which has not been properly considered by the learned trial Court; that the safe custody of narcotic has not been proven which renders the chemical report meaningless; that the alleged incident took place at KMC Graveyard near Rainy Channel, Saeedabad, which is busy road besides populated area on both sides but none from public was associated as a witness of the incident; that no independent witness has been joined and all the witnesses are police officials, therefore, their evidence cannot be safely relied upon; that the prosecution

failed to prove its case against the appellant beyond shadow of a reasonable doubt but learned trial court convicted the appellant, which is not sustainable in law and is liable to be set aside. He lastly prayed for the acquittal of the appellant.

6. On the other hand, learned Addl. P.G has contended that the prosecution has successfully proved its case by examining the P.Ws; that the appellant was caught red-handed on the spot and Charas were recovered from him which was kept in safe custody; that there are no major contradictions in the evidence of witnesses nor the same were pointed out by the defence counsel; that the impugned judgment does not suffer from any illegality or legal infirmity. He lastly prayed for the dismissal of the appeal.

7. We have heard learned counsel for the appellant as well as learned Addl. P.G and perused the material available on record with their able assistance.

8. The prosecution is also duty-bound to prove safe custody and safe transmission of the narcotic from its recovery till reaching the laboratory for FSL. The investigation officer during cross-examination stated that on 07-11-2019 he received the case property from the complainant and the same was deposited by him with the Head Mohrar and has also admitted that he has not produced any entry regarding keeping the case property with Head Mohrar. He further stated that he sent the charas for FSL on 08-11-2019. The Head Mohrar of the police station has not been examined by the investigation officer during the investigation nor was he examined before the trial court to prove that the charas was in his possession. Non-production of entry in respect of depositing the property in safe custody and its safe transmission for chemical report so also non-examining the incharge of the Malkhana or a person to whom such property was handed over for its safe custody is fatal to the case of the prosecution and cut the roots of the prosecution case. From a perusal of the chemical examiner's report it also reflects that it was sent on 08-11-2019 and was received at the lab on 18-11-2019 for which the report was issued on 16-12-2019 which too creates very serious doubt. Recently the Honourable Supreme Court of Pakistan in the case of ***Qaiser and another v. The State (2022 SCMR 1641)***,

has observed that “In absence of establishing the safe custody and safe transmission, the element of tempering 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 Substances (Government Analysts) Rules 2001 (Rules 20011, rests upon the report of the analyst. It is prosecutions 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 the 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 three members benches of this court i.e. Ikramulah v. The State (2015 SCMR 1002), The State v. Imam Bakhsh (2018 S'CMR 2039), Abdul Ghani v. The State (2019 SCMR 608), Kamran Shah v. 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 through 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 (2021 SCMR 451), Zubair Khan v. The State (2021 SCMR 492), Gulzar v. The State (2021 SCMR 380).”

9. After the reassessment of material as discussed above we have found that in the present case there are also a number of legal infirmities/lacunas, which have created serious doubt in the prosecution case. It is a settled principle of law that for extending the benefit of the doubt, there doesn't need to be multiple circumstances creating doubt. If a single circumstance, creates reasonable doubt in a prudent mind about the guilt of the accused,

then the accused will be entitled to such benefit not as a matter of grace and concession, but as a matter of right, as has been held in the case of **Tariq Pervez v. The State reported as (1995 SCMR 1345)**, wherein the Hon'ble Supreme Court has held as under:-

*"The concept of benefit of doubt to an accused person is deep-rooted in our country for giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right".*

10. Thus based on the particular facts and the circumstances of the present case and by relying on the above precedents of the Apex Courts we find that the prosecution has failed to prove the case against the appellant beyond a reasonable doubt by producing reliable, trustworthy and confidence-inspiring evidence. Therefore, we allow the instant appeal, set aside the impugned judgment dated 26-10-2020, passed by the learned VIII- Additional Sessions Judge Karachi West in Sessions Case No.67/2020 arising from Crime No.518/2019 U/s 6/9 (Cof CNS Act, 1997 of P.S. Saeedabad, Karachi and acquit the appellant Akbar Hussain s/o Masood Khan from the charges by extending him the benefit of the doubt. He shall be released forthwith if not required in any other custody case.

11. The above appeal is disposed of in the above terms.

**JUDGE**

**JUDGE**