

IN THE HIGH COURT OF SINDH, KARACHI

Present:

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

CRIMINAL APPEAL NO. 126 OF 2021

Appellants : 1. Islam Shah son of Syed Kamal Shah
2. Shaukat Ali son of Rasheed.
Through Mr. Raheel-ud-Din,
Advocate.

Respondent : The State through Mr. Ali Tahir,
Special Prosecutor, Coast Guards.

Date of Hearing : 27.10.2022.
Date of Judgment : 03.11.2022.

J U D G M E N T

ZULFIQAR ALI SANGI-J., Through this appeal the appellants have assailed the judgment dated 17.02.2021 passed by learned Special Court Control of Narcotic Substances No. I at Karachi in Special Case No.649 of 2015 arising out of crime No.1009 of 2015 for offence U/section 9(C) of Control of Narcotic Substances Act, 1997, registered at PS Coast Guard, Karachi whereby appellants namely Islam Shah son of Syed Kamal Shah and Shaukat Ali son of Rasheed were convicted under Section 9(c) of Control of Narcotic Substances Act, 1997 and each sentenced to suffer Rigorous Imprisonment for life and to pay fine of Rs.1,00,000/- (Rupees one Lac only) each and in case of default they shall suffer Simple Imprisonment for one year more. However, the appellants were extended the benefit of Section 382-B Cr. P.C by the trial court.

2. The brief facts of the prosecution case as per F.I.R. are that the Commandant received a spy tip that a huge quantity of Hashish/charas is to be smuggled from Swabi to Karachi through Pakistan Coach bearing registration No.JB-7758. Upon such information, the commandant Battalion-II (Iqbal) Pakistan Coast Guard Karachi arranged a checking party in the command of CGO No.1115, Subedar Fazal Ahmed along with his subordinate staff for checking of coach at Superhighway check post, near Sohrab Goth. During checking on 11.11.2015 at about 1600 hours they saw that Pakistan Coach bearing registration No.JB-7758, Engine No.J08C22303, Chassis No.AK1JRKA-16203 was coming from

Nooriabad, hence they stopped said coach for checking. The complainant served the notice under Section 22 of the Control of Narcotic Substances Act, 1997, to the driver of the coach and took the search of the coach. As the civilians available on the bus expressed reluctance to act as mashirs, therefore, he (Subedar Fazal Ahmed) cited Naik Muhammad Tahir and LNK Faheem Niazi as mashirs. On query, the driver of the coach disclosed his name as Islam Shah and the second driver was Shaukat Ali, whom notice under section 23 of CNS Act, 1997 was served, thereafter, the complainant party started a search of the coach and secured 72 packets of hashish containing 80 kilograms lying at secret cavities of the said coach in presence of above said mashirs. The memo of arrest and inventory were prepared on the spot. 10 grams of hashish were extracted from each packet as a sample and were sealed for analysis. The remaining case property was sealed separately. The complainant seized the hashish and Pakistan Coach bearing registration NO.JB-7758 and arrested the accused named above and brought them along with the case properties and vehicle in question at P.S. Pakistan Coast Guard, Korangi Karachi, where instant FIR under Section 6/9-C Control of Narcotics Substance Act, 1997 was registered.

3. After usual investigation case was challaned before the court having jurisdiction and after completing all the legal formalities charge against the appellants was framed to which they pleaded not guilty and claimed trial. At the trial the prosecution examined 03 witnesses including the complainant, mashir of arrest and recovery and the investigation officer who produced/exhibited certain documents in support of the case of the prosecution.

4. The statements of appellants were recorded u/s 342 Cr. P.C wherein they denied prosecution allegations and pleaded their innocence. However, neither they examined themselves on oath nor led any evidence in their defence. After the trial, the learned trial Court after hearing the parties convicted and sentenced the appellants through impugned judgment as stated above.

5. Learned counsel for the appellants mainly contended that the appellants are innocent and have been falsely implicated in this case; that the prosecution has not been able to prove the case

against the appellants beyond the shadow of reasonable doubt; that the trial court seriously erred by not considering the material evidence brought on record by the appellants during the cross-examination of the prosecution witnesses which completely shattered the case of the prosecution; that the prosecution has failed to prove safe custody and safe transmission of the narcotic to the chemical examiner; that the trial court failed to apply judicial mind and the judgment has been delivered in a slip shod manner. Learned counsel lastly contended that the prosecution had failed to prove the charge against the appellants and prayed for acquittal of the appellants by extending them the benefit of the doubt. In support of his contentions he has relied upon the cases of ***Gulzar Vs. The State (2021 SCMR 380)***, ***Mst. Sakina Ramzan Vs. The State (2021 SCMR 451)***, ***Zubair Khan Vs. The State (2021 SCMR 492)***, ***Qaiser Khan Vs. The State (2021 SCMR 363)***, ***Riaz Mian and another Vs. The State (2014 SCMR 1165)***, ***Nasar-ud-Din Vs. The State (2021 YLR 457 Balochistan)*** and ***Inayat Vs. The State (2010 P.Cr.L.J 825, Karachi)***

6. On the other hand, learned Special Prosecutor Coast Guards has contended that the prosecution has successfully proved its case by examining the P.Ws, who have no enmity with the appellants; that there are eyewitnesses who deposed that in their presence the appellants were arrested and also recovery of 72 packets of hashish containing 80 kilograms lying at secret cavities of the said coach was affected. There is no major contradiction between the depositions of the complainant and P.Ws; that safe custody and transmission of the narcotic to the chemical examiner has been proven which lead to a positive chemical report and thus the impugned judgment does not call for any interference by this court. He prayed for the dismissal of the appeal. Learned Special Prosecutor Coastguards has relied upon the case of ***Abdul Rasheed Vs. The State (2009 SCMR 306)***.

7. We have heard learned counsel for the appellants as well as learned special prosecutor coast guard and perused the material available on record with their able assistance.

8. We have considered the evidence of the prosecution witnesses with the assistance of learned counsel for the appellants and the learned special prosecutor and found major contradictions and dishonest improvements in their evidence. It was the case of the prosecution that 72 packets were recovered from the secret cavity of the bus and the same was sealed on the spot. The mashirnama of recovery does not speak about the number of parcels in which charas was sealed after separating the samples. However, the complainant during examination-in-chief produced three sealed parcels as Article B to D and further deposed that Article B contains 12 packets of charas, Article C contains 30 parcels of charas and Article D contains 30 packets of Charas which on totaling becomes 72 packets and as per the evidence of complainant all the reaming property was sealed at the spot. P.W.2 mashir Muhammad Tahir during his examination-in-chief deposed that case property was sealed in two parcels and further deposed that the property available in the court is Article B which contains 36 packets of charas and Article C contains 37 packets of charas totalling 73 and there is no explanation as to how one packet of charas exceeded from the charas allegedly recovered and sealed at the spot from the appellants. Further, both witnesses are in contradiction in respect of bags/parcels, one deposed as 03 and the other as two. The mashir during cross-examination also admitted that the complainant produced three sealed parcels of Narcotics substances as Article B, C and D. However, admitted during his evidence that only Article C and D were present before the court containing 73 packets of charas and as such we find that all of these material contradictions cut the roots of the prosecution case and make it doubtful.

9. The complainant in his examination-in-chief has deposed that he had issued notices u/s 22 and 23 of CNS Act, 1997 to the driver of the bus and he has not deposed a single word that any duty clerk was with them at the time of recovery, however, P.W.2 mashir has stated during cross-examination that the notices u/s 22 and 23 of CNS Act, 1997 were prepared by the duty clerk on the dictation of seizing officer. He also during his examination-in-chief did not depose a single word as to whether the duty clerk was with

them at the time of recovery or not which makes the story of prosecution doubtful.

10. The investigation officer in his examination-in-chief has deposed that on 11.11.2015 he received an investigation of case crime No.1009/2015 and received case papers viz. FIR, mashirnama, notices u/s 22 and 23 of CNS Act, 1997, the case memo, **two sealed parcels of case property i.e. charas,** Pakistan Coach, its documents and arrested accused. If we believe the evidence of the investigation officer that on the day of recovery, he received two sealed parcels of case property then at the time of recording evidence of complainant from where was the third one sealed parcel produced before the court and was exhibited which reflects that either the complainant or the investigation officer gave false evidence.

11. It was the case of the prosecution that from each slab, 10 grams were separated for samples and 72 packets were prepared as per evidence of the investigation officer he sent sealed parcels to the Chemical Examiner on 13.11.2015. However, on perusal of the report issued by Dr Jalil Qadir, Director Laboratories Chemical Examiner to the Government of Sindh Karachi gross weight of parcels 1 to 73 which contains 15 grams each totaling 1080 grams. However, again it is mentioned in the said report with respect to net weight of 1 to 72 samples which contain 10 grams each and the total weight was 720 grams which also creates very serious doubt in respect of the samples as to whether 73 or 72 samples were received by the Chemical Examiner. Even weight is not matched with the total weight and gross weight of both 72 and 73 samples.

12. The above-noted contradictions in the evidence of prosecution witnesses indicate that the complainant and mashir were not the true eyewitnesses of the incident and no such incident of the arrest of the accused and recovery of hashish/charas from the bus had occurred as alleged by the prosecution. Taking notice of the contradictions in the evidence of the complainant and the mashir so also of the investigation

officer, we are clear in our mind that the prosecution failed to prove its case against the appellants beyond a shadow of reasonable doubt and the recovery has not been satisfactorily proved. Both the witnesses contradicted each other on material aspects of the case. No implicit reliance can be placed on their evidence in view of aforesaid contradictions on the evidence of prosecution witnesses.

13. It is observed that the mere heinousness of the charge and recovery of a huge quantity of the alleged contraband is no ground to convict the accused. The prosecution is under a bounden responsibility to drive home the charge by proving each limb of its case that essentially included the production of the witness tasked with the responsibility of keeping the narcotic in safe custody and safely transmitting the samples to the office of the Chemical Examiner. Failure to do so is fatal to the prosecution case. The investigation officer deposed that he sent sample parcels to the office of the Chemical Examiner through Dr Clerk; however, he stated that the name of said Dr. clerk he does not remember. On perusal of the chemical examiner's report, it reflects that the property was received through Hawaldar Rana Faiz but said Hawaladar Rana Faiz was neither examined by the investigation officer nor was produced before the trial court to certify that he took the property from the investigation officer and deposited the same with the Chemical Examiner. The investigation officer further stated during cross-examination that after receiving the case property on 11.11.2015 he deposited the same in the Malkhana and Malkhana incharge was Subedar Major however, he does not remember his name. He admitted that he has not produced any entry in respect of depositing the case property in Malkhana. He also admitted that he has not produced any entry in the respect that he received case property from Malkhana incharge for sending the same to the office of the Chemical Examiner. The prosecution has not examined the Incharge of the Malkhana (Subedar Major) to prove safe custody. From the above-discussed evidence, it can easily be said that the prosecution has not proved the safe custody and safe transmission of the property to the chemical examiner which renders the chemical report as worthless. In this regard the

Honourable Supreme Court in the case of **Mst. Razia Sultana v. The State and another (2019 SCMR 1300)**, has held as under:-

2. *At the very outset, we have noticed that the sample of the narcotic drugs was dispatched to the Government Analyst for chemical examination on 27.2.2006 through one Imtiaz Hussain, an officer of ANF but the said officer was not produced to prove safe transmission of the drug from the Police to the chemical examiner. The chain of custody stands compromised as a result it would be unsafe to rely on the report of the chemical examiner. This Court has held time and again that in case the chain of custody is broken, the Report of the chemical examiner loses reliability making it unsafe to support conviction. Reliance is placed on State v. Imam Bakhsh 2018 SCMR 2039).*
3. *For the above reasons the prosecution has failed to establish the charge against the appellant beyond reasonable doubt, hence the conviction and sentence of the appellant is set aside and this appeal is allowed, setting the appellant at liberty unless required in any other case.*

14. In another case of **Zahir Shah alias Shat V. The State through Advocate General, Khyber Pakhtunkhwa (2019 SCMR 2004)**, Honourable Supreme Court has held as under:-

2. *We have reappraised the evidence with the able assistance of learned counsel for the parties and have noticed at the very outset that the Police constable, bearing No.FC-688, who delivered the sealed parcel to the Forensic Science Laboratory, Peshawar on 27.2.2013 was not produced by the prosecution. This fact has been conceded by the learned law officer appearing on behalf of the respondents. This court has repeatedly held that safe custody and safe transmission of the drug from the spot of recovery till its receipt by the Narcotics Testing Laboratory must be satisfactorily established. This chain of custody is fundamental as the report of the Government Analyst is the main evidence for the purpose of conviction. The prosecution must establish that chain of custody was unbroken, unsuspecting, safe and secure. Any break in the chain of custody i.e., safe custody or safe transmission impairs and vitiates the conclusiveness and reliability of the Report of the Government Analyst, thus, rendering it incapable of sustaining conviction. Reliance is placed on State v. Imam Bakhsh (2018 SCMR 2039).*

15. 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)."

16. After our reassessment of the evidence file 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 do not 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".

17. 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 appellants beyond a reasonable doubt by producing reliable, trustworthy and confidence-inspiring evidence. Therefore, we allow the instant appeal, set aside the impugned judgment dated 17-02-2021, passed by the special court No.1 (Control of Narcotic Substance) Karachi, in special case No.649/2015 arising from Crime No.1009/2015 U/s 9(C) CNS Act, 1997 of P.S. Coast Guard, Karachi and acquit the appellants Islam Shah son of Syed Kamal Shah and Shaukat Ali son of Rasheed from the charges by extending them the benefit of the doubt. They shall be released forthwith if not required in any other custody case.

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

JUDGE

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