

IN THE HIGH COURT OF SINDH, KARACHI

Present:

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

CRIMINAL APPEAL NO. 470 OF 2021

Appellants: 1. Muhammad Yousuf son of Bashir Ahmed
2. Rashid Hussain son of Karam Hussain.
Through Mr. Zakir Hussain Bughio, Advocate.

Respondent: The State through Mr. Habib Ahmed Special
Prosecutor, ANF.

Date of Hearing: 31.10.2022.

Date of Judgment: 16.11.2022.

J U D G M E N T

ZULFIQAR ALI SANGI-J. Appellants found guilty of possessing 25 Kgs Charas were convicted by learned Special Court No. II (Control of Narcotic Substances), Karachi in Special Case No.183 of 2018 bearing FIR No.18 of 2016 for offence U/section 6/9-C read with section 14/15 Control of Narcotic Substances Act, 1997, registered at PS ANF-II, Karachi and sentenced to suffer Life Imprisonment with fine of Rs.200,000/- (Two Lac Rupees Only) each and in default, to further undergo for two (02) years imprisonment with the benefit of Section 382-B Cr.P.C. vide judgment dated 09.08.2021. By means of this appeal, the appellants have assailed their convictions and sentences.

2. Brief facts of the prosecution case as per F.I.R. are that on 05.03.2016 at about 1730 hours on a tip-off the Complainant Inspector Muhammad Muzamil Ahmed of PS ANF-II Karachi along with other ANF officials arrested appellants in front of the office of Executive Engineering, New Malir Housing Project, Scheme No.1, Sassui Toll Plaza, National Highway, Karachi while coming on a Motorcycle bearing Registration No.KIU-7612 and recovered 25 foil packets of Charas weighing 25 Kgs Charas from them. After observing the requisite formalities, the arrested accused persons, and recovered contraband Charas and their Motorcycle were brought to PS ANF-II, where FIR was lodged.

3. After usual investigation charge sheet against the appellants was submitted before the court having jurisdiction and after completing the legal formalities including supplying the copies of papers the charge against them was framed to which they pleaded not guilty and claimed trial. At the trial, the prosecution examined four (04) witnesses including the complainant, mashir of arrest and recovery and Investigating Officer etc., who exhibited various documents and items in support of the case of the prosecution.

4. The statements u/s 342 Cr. P.C of the appellants were recorded to which they denied prosecution allegations and pleaded their innocence. They examined themselves on oath and produced two defence witnesses in their defence. After hearing the parties the trial court 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 failed to prove the charge against the appellants beyond a shadow of reasonable doubt; that as per complainant sample of 20 grams from each packet was separated at the place of incident and as per entry No.4 of daily diary of P.S. samples were sealed after taking out the recovered charas from Malkhana which creates serious doubt in the prosecution case; that there are contradictions in the evidence of P.Ws in regard to the recovery of narcotics etc. but same were not considered by the trial court; that P.W.2 Raja Iftikhar stated that Malkhana Incharge handed over the case property to complainant Muhammad Muzamil, who handed over the same to him; that P.W.2 in his evidence stated that there was katcha path where mobile was stopped but site inspection memo revealed that there was no space to park the vehicles; that there is no evidence of safe custody of recovered charas from the time of its recovery up to sending samples to the Chemical Examiner. Lastly, he prayed for setting aside the impugned judgment and acquittal of the appellants by extending them the benefit of the doubt. In support of his arguments learned counsel has relied upon the cases of ***Ahsan Marfani v. The State (2022 YLR Note 5)***, ***Mst. Sakina Ramzan v. The State (2021 SCMR 451)*** and ***Minhaj Khan v. The State (2019 SCMR 326)***.

6. On the other hand learned Special Prosecutor ANF 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 from them 25 foil packets of Charas weighing 25 Kgs were recovered; that there are no major contradictions between the evidence of the complainant and the other P.Ws and thus the prosecution has proved its case beyond a reasonable doubt and the impugned judgment does not call for any interference by this court and the appeal should be dismissed.

7. We have heard learned counsel for appellants and learned Special Prosecutor ANF and examined the record and the case law cited at the bar with their able assistance.

8. The case of the prosecution is that the raiding party after information had stopped their vehicles in front of the office of Executive Engineer new Malir Housing Project Scheme-1 near Sassui Toll Plaza and the complainant and mashir also deposed during their examination-in-chief the same which confirms that they stopped their vehicles in front of a Govt. building. However, on an application u/s 539-B Cr. P.C filed by learned defence counsel, Nazir of the trial court was appointed as commissioner for inspection of the place of recovery, who had submitted his report mentioning that there was **no office building at the pointed place where the vehicles were stopped and the inspection was carried out on the pointation and in presence of the complainant.** P.W.2 Raja Iftikhar during cross-examination stated that there was no office where they were standing but on their back side there were showroom-type offices beside a Chapra hotel. The court witness No.1 Sajid Mehmood during his cross-examination stated that Inspector Muhammad Muzamil pointed out the place and informed that vehicles were parked at the time of occurrence at that place and in front of it **there was no building of Executive Engineer, New Malir Housing Project Scheme-1.** These aspects of the case make the recovery alleged by the prosecution doubtful. P.W.1 complainant Muhammad Muzamil during cross-examination stated that HM (Head Mohrar) had reduced to writing the entry and the FIR while P.W.2 mashir Raja Iftikhar stated that the same was registered by the complainant

himself. P.W.2 Raja Iftikhar during cross-examination stated that there was no other road except the main National Highway and there was no link road. However, C.W.1 Sajid Mehmood during his cross-examination contradicted him by stating **that there was a service road adjacent to Sassui Toll Plaza while** going to the Gharo side from Karachi. P.Ws 1 and 2 negated the suggestion that after crossing Sassui Toll Plaza there was a Rangers check post, however, C.W.1 Sajid Mehmood admitted that there was a Rangers picket. The witnesses during cross-examination mostly used the words that they do not remember on certain questions and suggestions put to them by the defence counsel. The discrepancies in the testimonies of the two witnesses; the purported lack of knowledge about certain things which they ought to have remembered and not knowing those things which they should have to known as in the present case is fatal to the case of the prosecution. Reliance can be placed on the case of ***Minhaj Khan v. The State (2019 SCMR 326)***.

9. The prosecution in respect of safe custody of alleged charas has not produced strong evidence to prove the same. P.W.1 Inspector Muhammad Muzamil has deposed that he deposited the case property in the Malkhana. He did not utter a single word in respect of in charge Malkhana at that time who was the in charge of Malkhana. However, P.W.3 Muhammad Rasheed who took the samples to the Chemical Examiner has stated that incharge Malkhana had handed over the samples to complainant inspector Muhammad Muzamil, who had handed over the same to him, which reflects that P.W.1 Muhammad Muzamil was not the incharge of Malkhana and someone else had handed over him the samples from the Malkhana to him. The prosecution in order to cover up this lacuna in their case moved an application before the trial court u/s 540 Cr. P.C wherein it is mentioned that Malkhana incharge was SI Afzal Nazeer and at the time of application was posted at Peshawar. Subsequently another application u/s 540 Cr. P.C was moved, wherein the name of Incharge Malkhana was mentioned as (complainant) Muhammad Muzamil stating that name of SI Afzal Nazeer was given mistakenly. Inspector Muhammad Muzamil was again examined and he introduced himself to be the incharge of Malkhana. However, in his earlier

deposition as P.W.1, he did not depose a single word that he was the incharge of Malkhana at that time, which conflicts with the evidence of P.W.3 HC Muhammad Rasheed, who in clear words stated that incharge Malkhana had handed over the samples to P.W.1 Muhammad Muzamil, who handed over the same to him, which in our view was an afterthought and managed one to bring the case in conformity with the recent view of the Honourable Supreme Court in respect of proving the safe custody and safe transmission of the narcotic to the chemical examiner. After a look at the evidence in respect of safe custody of alleged charas, we are of the view that the prosecution has **not** been able to prove the same and did not examine the incharge Malkhana who was available at that time but instead managed the evidence of Muhammad Muzamil to fill the lacuna. Further the alleged charas was recovered on 05.07.2016 and samples were sent to the Chemical Examiner on 07.07.2016. There is no evidence to ascertain as to whether the property was kept in safe custody from its recovery till its arrival at the office of the chemical examiner. Therefore, by failing to prove the safe custody of the recovered contraband, the same could not be used against the appellants in this regard and the chemical report is of no legal value. 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.*

10. 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)*.

11. 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).”

12. The appellants also examined themselves on oath under section 340(2) Cr.P.C. and stated that on the day of incident at 1800 hours they had a dispute on an electricity issue between them and the Mohalla people and during such dispute police came on two mobiles and arrested them and they were handed over to ANF Officials where they were falsely involved in the case. To support their version they examined DW-1 Nadeem Ahmed and DW-2 Makhdoom Abdul Khalique, both of whom supported their version while deposing that there was a quarrel between the accused and DW.1 Nadeem Ahmed and the matter was being patched up, however, police came there and took away the appellants. In respect of such quarrel a N.C report No. 19 at 1735 on 05-03-2016 for the offence under section 337 F(i) and 504 PPC was registered at police station Gharo **which was exhibited** in their evidence and supports the version of the appellants. Both the defence witnesses are also independent and not related to the appellants but rather just neighbors who had witnessed him being arrested on the day of the incident and nothing was recovered from them at the time of their arrest. The ANF has not challenged the said N.C report during their cross-examination. As such, the defence plea set up by the appellants appears to have some weight in the absence of any denial by the prosecution.

13. It is also an established principle of law that an accused person is presumed to be innocent till the time he is proven guilty beyond a reasonable doubt and this presumption of his innocence continues until the prosecution succeeds in proving the charge against him beyond a reasonable doubt on the basis of legally admissible, confidence-inspiring, trustworthy and reliable evidence. It is well-settled law that the prosecution is bound to prove its case against the accused beyond any shadow of reasonable doubt, but no such duty is cast upon the accused to

prove his innocence. It has also been held by the Superior Courts that conviction must be based and founded on unimpeachable evidence and certainty of guilt and any doubt arising in the prosecution case must be resolved in favour of the accused. The rule of giving the benefit of doubt to an accused person is essentially a rule of caution and prudence and is deep-rooted in our jurisprudence for the safe administration of criminal justice. In common law, it is based on the maxim, "**It is better that ten guilty persons be acquitted rather than one innocent person be convicted**". While in Islamic criminal law it is based on the high authority of sayings of the Holy Prophet of Islam (Peace Be Upon Him): "**Avert punishments (hudood) when there are doubts**" and "**Drive off the ordained crimes from the Muslims as far as you can. If there is any place of refuge for him [accused], let him have his way, because the leader's mistake in pardon is better than his mistake in punishment.**" The Hon'ble Supreme Court has quoted probably the latter part of the last-mentioned saying of the Holy Prophet (PBUH) in the case of *Ayub Masih v. State (PLD 2002 SC 1048)* "**Mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent.**" The same principle has also been followed by the Honourable Supreme Court of Pakistan in the recent Judgment in the case of *Naveed Asghar and 2 others v. The State (PLD 2021 SC 600)*.

14. After our reassessment of the evidence produced by the prosecution as discussed above and while taking the defence plea of the appellants in juxtaposition we are of the view that the prosecution has **not** proved its case against the appellants beyond a reasonable doubt and 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 Honourable Supreme Court of Pakistan 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".

15. Thus based on the particular facts and the circumstances of the present case as discussed above we allow the instant appeal, set aside the impugned judgment dated 09.08.2021 passed by the Special Court No. II (Control of Narcotic Substances), Karachi in Special Case No.183 of 2018 arising out of FIR No.18 of 2016 for offences under section 6/9-C read with section 14/15 of Narcotic Substances Act, 1997, registered at PS ANF-II, Karachi and acquit them from all the charges. They shall be released forthwith if not required in any other custody case.

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

JUDGE

JUDGE