

**IN THE HIGH COURT OF SINDH,
BENCH AT SUKKUR**

Spl. Criminal Appeal No. D-44 of 2023

Present:-

Yousuf Ali Sayeed &
Zulfiqar Ali Sangi, JJ

Appellant : Mazhar Ali Bhatti, through Alam Sher Bozdar, Advocate.

Respondent : The State through Shafi Muhamad Mahar, APG

Date of hearing : 22.11.2023

JUDGMENT

YOUSUF ALI SAYEED, J. - Per the prosecution, the Appellant was apprehended while standing near the railway crossing at the cement factory situated on the road leading towards Sadhlo Rohri on 12.07.2022 at 6:10 p.m. by a police party led by ASI Jahangir Khan Jagirani (the “**Complainant**”) and otherwise comprising of HC Riaz Ahmed Korai, PC Sikandar Ali Kalhoro, and DPC Ghulam Sarwer, all of whom were said to have been deployed from PS Rohri for the purposes of patrolling. It is said that upon a personal search being carried out on the spot, a white colour shopping bag was recovered from the possession of the Appellant, containing 10 packets of charas, each weighing 1 kg, with that case property being sealed for onward transmission to the Chemical Examiner and a Memo as to the arrest and seizure being prepared by the Complainant in the presence of two Mashirs, namely HC Korai and PC Kalhoro. A First Information Report, bearing Crime Number 108 of 2022 (the **FIR**), was then registered in the matter by the Complainant at P.S. Rohri at 7:20 PM on the same day.

2. Following the usual investigation, the matter was challaned and sent up before the Additional Sessions Judge-III/MCTC-II/Special Judge (CNS), Sukkur (the “**Trial Court**”), where the Appellant came to be charged in the ensuing Special Case, bearing No. 226 of 2022, under S.9(c) of the Control of Narcotic Substances Act, 1997 on account of a contravention of Section 6 thereof, to which he pleaded not guilty and claimed trial.

3. Of the officials said to have comprised the police party, the Prosecution examined only the Complainant (PW-1) and one of the Mashirs to the arrest and recovery, namely HC Korai (PW-2), as well as the two investigating officers of the case, namely SIP Ghulam Murtaza Junejo (PW-3) and SIP Noor Muhammad Bhayo (PW-4). The Complainant produced the Departure Entry No. 25, the Memo of Arrest and Recovery, Arrival Entry No. 33, and the FIR, while HC Korai produced the Memo of Inspection of the Place of Incident. SIP Bhayo produced Departure Entry No. 42, Arrival Entry No. 17, Departure Entry No. 10, Arrival Entry No.15, the Road Certificate and Entry No. 25 of Register No.19, whereas SIP Junejo produced the Report of the Chemical Examiner. Thereafter, the DDPP closed the side of the prosecution. Conversely, the Appellant took the stance vide his Statement under S.342 Cr.PC that the matter was one of false implication due to a marital feud.

4. Based on the depositions of those witnesses and the evidence produced by them, the Trial Court concluded that the prosecution had successfully proven the charge against the Appellant, with a finding of guilt accordingly being recorded against him in terms of the judgment rendered on 08.07.2023 (the **Impugned Judgment**), whereby he was sentenced to suffer rigorous imprisonment for a period of 14 years and to pay a fine of Rs.100,000/- and in case of failure, to suffer simple imprisonment for 1 year, with the benefit of Section 382-B extended. Being aggrieved, the Appellant has preferred the instant Appeal.

5. Learned counsel for the Appellant assailed the Impugned Judgment, contending that the so-called facts narrated in the FIR were a fabrication, designed to falsely implicate the Appellant, and that the evidence produced was insufficient for the Trial Court to have recorded a conviction, with the prosecution having failed to establish safe custody as well as transmission of the samples to the office of the Chemical Examiner. He submitted that the case of the prosecution was thus marred by gaps and defects and under such circumstances there was no scope for a conviction.

6. Conversely, the learned APG defended the Impugned Judgment, but while relying almost entirely on the Report of the Chemical Examiner to contend that the samples received were found to be charas, which itself served to establish the guilt of the Appellants so as to prove the charge against him, hence the conviction ought to be sustained.

7. Having considered the matter in light of the record, we have observed that the place of arrest was not a transport hub, but on the contrary, was shown to be desolate, with no other persons in the vicinity, despite it being the early part of the evening. As such, the purpose of the Appellant in being present there with 10 kg of charas in hand is not apparent, and it is strange that he did not even seek to discard or dispose of the same when he could obviously have espied the police van approaching at some distance. Furthermore, whilst the prosecution witnesses furnished their testimony as to the interception of the Vehicle and the investigative steps taken thereafter, the testimony of the witnesses who were shown to have participated in the arrest and recovery are contradictory in certain respects, whereas, more fundamentally, the chain of custody also remains shrouded in uncertainty due to gaps between the alleged recovery and the time that the samples were sent to the Chemical Examiner.

8. Indeed, from a reading of the depositions of the prosecution witnesses and an examination of the documents produced by them, the following points merit consideration:
- (a) The white coloured shopping bag said to have been recovered from the Appellant containing the slabs of charas was not produced as part of the case property, and the currency notes said to have been recovered from the Appellants on his personal search were neither properly inventoried, nor produced;
 - (b) There is a glaring discrepancy between the testimony of the prosecution witnesses on the one hand and the Memo of Arrest and Recovery and the FIR on the other regarding the subject of weighing of the charas at the scene of recovery in as much as the Complainant and HC Korai stated that the former had conducted weighed the same whereas the aforementioned documents reflect that the exercise was carried out by PC Kalhoro.
 - (c) Last but not least, turning to the chain of custody, the Complainant (PW-1) stated in his deposition that upon returning to the police station on the day of the arrest (i.e. 12.02.2022), the case property was handed over to SIP Bhayo along with the police papers for investigation of the case. For his part, the SIP acknowledges in his deposition that the same was received by him that day. However, he said nothing regarding depositing the case property in the Malkhana, but went on to say that the samples were sent to the Chemical Examiner on 15.07.2022, which gives rise to the question as to where the same were kept during the intervening period and raises doubt as to safe custody.
9. When confronted with the aforementioned lapses and discrepancies, especially the information vacuum as to custody of the case property, the learned APG was at a loss to advance any cogent explanation in that regard.

10. Needless to say, the chain of custody is a matter of pivotal importance, and its sanctity is absolutely imperative for the Chemical Examiner's Report to have any real probative value. We are fortified in this regard by a long line of caselaw emanating from the Supreme Court, including the judgments in the cases reported as *The State through Regional Director ANF v. Imam Bakhsh and others* 2018 SCMR 2039, *Zahir Shah alias Shat v. The State through Advocate General, Khyber Pakhtunkhwa* 2019 SCMR 2004, and *Mst. Sakina Ramzan v. The State* 2021 SCMR 451.

11. Indeed, it is pertinent to observe that it was held by the Supreme Court in the case of *Zahir Shah* (Supra) on that subject as follows:

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).

12. In the case of *Sakina Ramzan* (Supra), while restating the principle laid down in *Imam Bakhsh*, the Court observed in the same vein that:

“The chain of custody or safe custody and safe transmission of narcotic drug begins with seizure of the narcotic drug by the law enforcement officer, followed by separation of the representative samples of the seized narcotic drug, storage of the representative samples and the narcotic drug with the law enforcement agency and then dispatch of the representative samples of the narcotic drugs to the office of the chemical examiner for examination and testing. This 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.”

13. In the matter at hand, it is apparent that the prosecution has failed to satisfactorily discharge the burden of proof so as to drive home the charge against the Appellant, having been unable to establish the necessary links of the chain and demonstrate that after the alleged recovery, the substance so recovered was kept in safe custody and safely transmitted to the office of the Chemical Examiner without being tampered with.

14. It is well settled in criminal jurisprudence that so much as a single circumstance that creates reasonable doubt in a prudent mind as to the guilt of an accused entitles him to the benefit of such doubt, not as a matter of grace and concession but as a matter of right, and if any authority is required in that regard, one need look no further than the Judgments in the cases reported as Muhammad Akram v. The State 2009 SCMR 230 and Tariq Pervez, v. The State 1995 SCMR 1345.

15. In view of the foregoing, the Appeal is allowed, with the Impugned Judgment being reversed and the Appellant being acquitted of the charge, the conviction and sentence awarded to him in the underlying case being set aside, and it being ordered that he be released forthwith, unless required in connection with any other custody case.

JUDGE

Sukkur
Dated _____

JUDGE