

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Spl.Cr.Jail Appeal No.D-140 of 2022

Date	Order with signature of Judge
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Before:
Mr. Justice Naimatullah Phulpoto, J
Mr. Justice Amjad Ali Bohio, J

Appellant : Bakht Ali s/o Munawar Ali Bozdar,
through Mr. Alam Sher Bozdar, Advocate

Respondents : The State through Syed Sardar Ali Shah
Rizvi, Additional Prosecutor General

Date of hearing: 05.07.2023.

JUDGMENT

AMJAD ALI BOHIO, J:- This Criminal Appeal is directed against the judgment dated 23.12.2022 passed by learned Sessions Judge/Special Judge (CNS), Khairpur. Appellant was tried for offence under Section 9(c) of the Control of Narcotic Substances Act, 1997. After regular trial, he was convicted and sentenced to imprisonment for four years and six months R.I and to pay fine of Rs.20,000/- (Rupees Twenty Thousand), in case of default to undergo S.I for five months.

2. According to the FIR registered on 03.08.2022 at 1800 hours by complainant ASI Taqi Muhammad of P.S Kumb, Khairpur, the prosecution's case is that during patrolling, ASI Taqi Muhammad and his subordinate staff apprehended appellant Bakht Ali Bozdar on the Southern side of the link road that leads from Jiskani to Bozdar Wada, next to the Gas Pipe Line. Appellant was apprehended at 1700 hours, on his personal search, police recovered two and a half slabs

of charas weighing 1300 grams from his possession. Appellant was arrested in presence of mashirs and Charas was sealed at spot and police brought accused and case property to P.S. Kumb, where this FIR was registered against him for the offence under Section 9(c) of the CNS Act, 1997.

3. After the completion of usual investigation, the Investigating Officer submitted the report u/s 173 Cr.P.C., against the appellant. Trial Court framed charge against appellant on 19.11.2022 under above referred offence. He pleaded not guilty to the charge and opted to proceed with the trial.

4. To prove it's case, the prosecution firstly, examined complainant/ASI Taqi Muhammad (PW-1) who produced attested carbon copies of the entry of departure, memo of arrest and recovery, FIR, as well as attested copies of entries number 18 and 19. Then, Mashir H.C Niaz Hussain was examined by the prosecution, who produced the memo of the place of the incident. The Investigating Officer (I.O./SIP Abdul Wahid) produced an attested Photostat copy of entry number 28 of register 19, entries numbers 30 and 03, carbon copy of the Road Certificate and the Chemical Examiner's report. Thereafter, prosecution closed it's side.

5. During the statement of accused recorded under Section 342 of the Cr.P.C., by trial Court, the appellant denied the allegations and claimed that the report of the Chemical Examiner has been manipulated, asserted his innocence and stated that he had been falsely implicated in the case. However, he did not examine himself on oath or led any evidence in his defense.

6. Trial Court after hearing the arguments and assessment of evidence convicted and sentenced as mentioned above. Hence, instant appeal is filed.

7. We have heard the arguments of learned counsel for the appellant as well as learned Deputy Prosecutor General representing the State. We have also thoroughly re-examined the evidence.

8. Appellant's counsel contends that the appellant is innocent and has been falsely implicated in the case. He has contended that the charas was planted on the appellant by the police. He further pointed out major contradictions in the evidence of the prosecution witnesses. The defense counsel also pointed out that PC Din Muhammad who handled the parcel to the Chemical Examiner, has not been examined, to establish the safe custody and safe transmission of the alleged recovered narcotic substance to Chemical Examiner. He further claimed that no private person was produced as a witness and that the chemical report was not issued based on the actual Road Certificate (RC) bearing Memorandum No.40 dated 06.08.2022 but on a forwarding letter, which has not been produced by the prosecution. Lastly, he argues that the chemical report did not pertain to the parcel sent to the chemical examiner in this case. The defense counsel concludes by praying for the appellant's acquittal.

9. In contrast, the learned Deputy Prosecutor General for the State has supported the impugned judgment and argues that the contradictions raised by the defense counsel are insignificant, as they are minor in nature. He asserts that the parcel was sent to the Chemical Examiner within 72 hours of the alleged recovery. The Deputy Prosecutor General contends that the prosecution has successfully proven the guilt of the accused beyond any reasonable doubt.

10. We have come to conclusion that the prosecution has failed to prove the chain of circumstances under which the parcel was kept in safe custody malkhana and subsequently transmitted to the Chemical Examiner for chemical analysis, as stated in the report

of the Chemical Examiner. The Investigating Officer mentioned that the property/parcel was kept in malkhana through WHC, and such entry was recorded in Register No.19. However, said WHC was not produced as a witness before trial Court to testify that he had kept the said parcel in safe custody from 03.08.2022 to 05.08.2022. It was further mentioned that the parcel was dispatched on 05.08.2022 via RC No.40 dated 06.08.2022. Additionally, the prosecution did not examine dispatcher PC Din Muhammad.

11. The Investigating Officer had also failed to produce PC Din Muhammad's departure and arrival entries, which would have documented the delivery of the parcel to the Chemical Examiner. Furthermore, he did not provide any information regarding the number of such entries or the specific timings of PC Din Muhammad's departure and arrival. These significant gaps in the Investigating Officer's statement, particularly his lack of knowledge regarding these essential details, lead to the conclusion that the prosecution has not been able to establish safe custody and safe transmission of charas to Chemical Examiner. The Investigating Officer also did not record the statement of the WHC, the individual responsible for keeping the parcel in the Malkhana, and PC Din Muhammad, who dispatched the parcel. Upon careful re-examination of the Chemical Examiner's report (Ex.5-E), it was noted that the parcel was allegedly received by the Chemical Examiner on 05.08.2022, one day before the mentioned date of the Memorandum (No.40 dated 06.08.2022). In light of the findings of the Apex Court in the case of Javed Iqbal v. The State (2023 SCMR 139), it is evident that the safe custody and transmission of the parcel could not be established before trial Court. The relevant excerpt from the aforementioned case is reproduced below for reference:

“4. We have heard the learned counsel for the appellant, learned Additional A.G. KP, perused the record and observed that in this case, the recovery was effected on 18.12.2013 and the sample parcels were received in the office of chemical examiner on 20.12.2013 by one FC No.1007 but the said constable was never produced before the Court. Even the Moharrar of the Malkhana was also not produced even to say that he kept the sample parcels in the Malkhana in safe custody from 18.12.2013 to 20.12.2013. It is also shrouded in mystery as to where and in whose custody the sample parcel remained. So the safe custody and safe transmission of the sample parcels was not established by the prosecution and this defect on the part of the prosecution by itself is sufficient to extend benefit of doubt to the appellant. It is to be noted that in the cases of 9(c) of CNSA, it is duty of the prosecution to establish each and every step from the stage of recovery, making of sample parcels, safe custody of sample parcels and safe transmission of the sample parcels to the concerned laboratory. This chain has to be established by the prosecution and if any link is missing in such like offences the benefit must have been extended to the accused. Reliance in this behalf can be made upon the cases of Qaiser Khan v. The State through Advocate-General, Khyber Pakhtunkhwa, Peshawar (2021 SCMR 363), Mst. Razia Sultana v. The State and another (2019 SCMR 1300), The State through Regional Director ANF v. Imam Bakhsh and others (2018 SCMR 2039), Ikramullah and others v. The State (2015 SCMR 1002) and Amjad Ali v. The State (2012 SCMR 577) wherein it was held that in a case containing the above mentioned defects on the part of the prosecution it cannot be held with any degree of certainty that the prosecution had succeeded in establishing its case against an accused person beyond any reasonable doubt. So the prosecution has failed to prove the case against the petitioner and his conviction is not sustainable in view of the above mentioned defects.”

12. The non-production of entries documenting the departure and arrival of the parcel constitutes a clear failure on the part of the prosecution to establish the safe custody and safe transmission of the parcel from the time of its recovery until its delivery to the

Chemical Examiner. This failure casts serious doubt on the authenticity of the report. In this context, it is relevant to consider the case of Pir Nauroz Ali Shah v. The State (2019 P.Cr.L.J 457), which states the following:

"In order to establish the movement of police officials through confidence inspiring evidence, the production of daily diary of the police Station showing the departure, constitution of raiding team, its members and subsequent arrival, was a material piece of evidence in favour of prosecution. Indeed the daily diaries are maintained under the erstwhile Police Rules, 1934. Under Rule 28.48 it is mandatory for every police official to make entry of his departure, arrival and all proceedings conducted between the intervening period of departure and arrival. Non-production of the daily diary has caused serious doubts in the prosecution case regarding the mode and manner of raid."

13. Upon a thorough and careful re-examination of evidence, it becomes evident that the prosecution has failed to establish its case through reliable and confidence inspiring evidence. Furthermore, trial court failed to properly assess the evidence in its true context, leading to conclusions that are not supported by the evidence presented. Therefore, we have no hesitation in concluding that the prosecution has failed to prove that the charas was not in safe custody during the specified period. It is worth noting that even a positive report from the chemical examiner would not be sufficient/helpful to prove the prosecution's case, as stated in the case of Basit Ali v. The State (2023 P.Cr.L.J 683). Consequently, this court overturned the conviction and sentence recorded by the trial court, by short order dated 05.07.2023 resulting in the acquittal of the appellant.

These are the reasons for our short order dated 05.07.2023.

JUDGE

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of charas weighing 1300 grams from his possession. Appellant was arrested in presence of mashirs and Charas was sealed at spot and police brought accused and case property to P.S. Kumb, where this FIR was registered against him for the offence under Section 9(c) of the CNS Act, 1997.

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6. Trial Court after hearing the arguments and assessment of evidence convicted and sentenced as mentioned above. Hence, instant appeal is filed.

7. We have heard the arguments of learned counsel for the appellant as well as learned Deputy Prosecutor General representing the State. We have also thoroughly re-examined the evidence.

8. Appellant's counsel contends that the appellant is innocent and has been falsely implicated in the case. He has contended that the charas was planted on the appellant by the police. He further pointed out major contradictions in the evidence of the prosecution witnesses. The defense counsel also pointed out that PC Din Muhammad who handled the parcel to the Chemical Examiner, has not been examined, to establish the safe custody and safe transmission of the alleged recovered narcotic substance to Chemical Examiner. He further claimed that no private person was produced as a witness and that the chemical report was not issued based on the actual Road Certificate (RC) bearing Memorandum No.40 dated 06.08.2022 but on a forwarding letter, which has not been produced by the prosecution. Lastly, he argues that the chemical report did not pertain to the parcel sent to the chemical examiner in this case. The defense counsel concludes by praying for the appellant's acquittal.

9. In contrast, the learned Deputy Prosecutor General for the State has supported the impugned judgment and argues that the contradictions raised by the defense counsel are insignificant, as they are minor in nature. He asserts that the parcel was sent to the Chemical Examiner within 72 hours of the alleged recovery. The Deputy Prosecutor General contends that the prosecution has successfully proven the guilt of the accused beyond any reasonable doubt.

10. We have carefully heard the learned counsel for the parties and scanned the entire evidence in the light of contentions raised by the counsel for the appellant.

11. Upon reviewing the record, it transpired that ASI Taqi Muhammad, found the appellant holding a plastic shopper while leaving Police Station Kumb. Upon seeing the police, the appellant attempted to flee but was apprehended due to his suspicious behavior. During interrogation, the appellant disclosed his name as Barkat Ali son of Munawar Ali Bozdar. A search of his person in presence of mashirs namely HC Niaz Hussain and PC Din Muhammad resulted in the recovery of two and a half slabs of charas weighing 1300 grams. The charas was sealed for chemical examination.

12. Upon careful re-examination of evidence significant contradictions have been observed in the evidence of the prosecution witnesses. One such glaring contradiction is the timing of events. The complainant stated that they left the place of the incident at around 1730/1740 hours and arrived at the Police Station at 1800 hours. However, the mashir, HC Niaz Hussain, testified that they spent approximately 30 to 40 minutes at the place of the incident, left at 1705 hours, and arrived at the Police Station within 20 to 25 minutes. Considering the mashir's evidence, if they arrived at the Police Station at 1725/1730 hours, then the complainant's claim of their arrival at 1800 hours is not substantiated. The complainant produced entry of his arrival at the Police Station after the arrest and recovery, marked as Exhibit 3-D with entry number 18, indicating a time of arrival at 1800 hours. Therefore, the availability of the mashir at the time of arrest and recovery becomes highly doubtful.

13. Additionally, the mashir's testimony raises doubts as he claimed that the arrest and recovery of the alleged charas occurred at 1700 hours and they left the place of the incident within 5 minutes at 1705 hours. However, he also mentioned that they spent 30 to 40 minutes at the place of the wardat (incident), including the

preparation of the mashirnama. This contradiction is perplexing, as it does not align with continuity of the events. Furthermore, the evidence provided by both the complainant and the mashir regarding the non-availability of a private person during their 30 to 35 minutes' stay at the public place, i.e., the link road, does not seem reasonable.

14. Considering these contradictions in the prosecution's case, it leads to the inference that the incident might not have occurred in the manner as is stated in the FIR. In our jurisprudence, the concept of granting the benefit of doubt to accused is deep rooted. It is not necessary for there to be multiple circumstances that create doubt. If there is even a single circumstance that reasonably raises doubt in the mind of a prudent individual regarding the guilt of the accused, then the accused is entitled to the benefit of doubt. This entitlement is not a matter of grace or concession but a matter of right. This principle is elaborated in the case of Muhammad Akram v. The State (2009 SCMR 230), where the Hon'ble Supreme Court held as follows:

"It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State (1995 SCMR 1345) that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right". Same view has also been taken in the case reported as Muhammad Mansha v. State (2016 SCMR 772), wherein it was also held that "it is better that ten guilty persons be acquitted rather than one innocent person be convicted."

15. The prosecution has failed to prove the chain of circumstances under which the parcel was kept in safe custody and

subsequently transmitted to the Chemical Examiner for chemical analysis, as stated in the report of the Chemical Examiner. The Investigating Officer mentioned that the property/parcel was placed in malkhana through WHC, and this entry was recorded in Register No.19. However, he refrained to specify the name of the WHC and admitted that the WHC had not been produced as a witness to testify that they had kept the said parcel in safe custody from 03.08.2022 to 05.08.2022. It was further mentioned that the parcel was dispatched on 05.08.2022 via RC No.40 dated 06.08.2022. Additionally, the prosecution did not examine dispatcher PC Din Muhammad. In this context, it is relevant to refer to the case titled "Ikramullah and others v. The State" reported as 2015 SCMR 1002. The following extract from Para.5 is reproduced below:

"5. In the case in hand not only the report submitted by the Chemical Examiner was legally laconic but safe custody of the recovered substance as well as safe transmission of the separated samples to the office of the Chemical Examiner had also not been established by the prosecution. It is not disputed that the Investigating Officer appearing before the learned trial court had failed to even to mention the name of the police official who had taken the samples to the office of the Chemical Examiner and admittedly no such police official had been produced before the learned trial Court to depose about safe custody of the samples entrusted to him for being deposited in the office of the Chemical Examiner. In this view of the matter the prosecution had not been able to establish that after the alleged recovery the substance so recovered was either kept in safe custody or that the samples taken from the recovered substance had safely been transmitted to the office of the Chemical Examiner without the same being tampered with or replaced while in transit."

16. The Investigating Officer also failed to produce the record of PC Din Muhammad's departure and arrival, which would have documented the delivery of the parcel to the Chemical Examiner. Furthermore, he did not provide any information regarding the

number of such entries or the specific timings of PC Din Muhammad's departure and arrival. These significant gaps in the Investigating Officer's statement, particularly his lack of knowledge regarding these essential details, lead to the conclusion that the prosecution has not been able to establish its case against the appellant beyond a reasonable doubt. The Investigating Officer also did not record the statement of the WHC, the individual responsible for keeping the parcel in the Malkhana, and PC Din Muhammad, who dispatched the parcel. Upon careful re-examination of the Chemical Examiner's report (Ex.5-E), it was noted that the parcel was allegedly received by the Chemical Examiner on 05.08.2022, one day before the mentioned date of the Memorandum (No.40 dated 06.08.2022). In light of the findings of the Apex Court in the case of Javed Iqbal v. The State (2023 SCMR 139), it is evident that the safe custody and transmission of the parcel could not be established. The relevant excerpt from the aforementioned case is reproduced below for reference:

“4. We have heard the learned counsel for the appellant, learned Additional A.G. KP, perused the record and observed that in this case, the recovery was effected on 18.12.2013 and the sample parcels were received in the office of chemical examiner on 20.12.2013 by one FC No.1007 but the said constable was never produced before the Court. Even the Moharrar of the Malkhana was also not produced even to say that he kept the sample parcels in the Malkhana in safe custody from 18.12.2013 to 20.12.2013. It is also shrouded in mystery as to where and in whose custody the sample parcel remained. So the safe custody and safe transmission of the sample parcels was not established by the prosecution and this defect on the part of the prosecution by itself is sufficient to extend benefit of doubt to the appellant. It is to be noted that in the cases of 9(c) of CNSA, it is duty of the prosecution to establish each and every step from the stage of recovery, making of sample parcels, safe custody of sample parcels and safe transmission of the sample parcels to the concerned

laboratory. This chain has to be established by the prosecution and if any link is missing in such like offences the benefit must have been extended to the accused. Reliance in this behalf can be made upon the cases of Qaiser Khan v. The State through Advocate-General, Khyber Pakhtunkhwa, Peshawar (2021 SCMR 363), Mst. Razia Sultana v. The State and another (2019 SCMR 1300), The State through Regional Director ANF v. Imam Bakhsh and others (2018 SCMR 2039), Ikramullah and others v. The State (2015 SCMR 1002) and Amjad Ali v. The State (2012 SCMR 577) wherein it was held that in a case containing the above mentioned defects on the part of the prosecution it cannot be held with any degree of certainty that the prosecution had succeeded in establishing its case against an accused person beyond any reasonable doubt. So the prosecution has failed to prove the case against the petitioner and his conviction is not sustainable in view of the above mentioned defects.”

17. The non-production of entries documenting the departure and arrival of the parcel constitutes a clear failure on the part of the prosecution to establish the safe custody and proper transmission of the parcel from the time of its recovery until its delivery to the Chemical Examiner. This failure casts serious doubt on the authenticity of the report. In this context, it is relevant to consider the case of Pir Nauroz Ali Shah v. The State (2019 P.Cr.L.J 457), which states the following:

“In order to establish the movement of police officials through confidence inspiring evidence, the production of daily diary of the police Station showing the departure, constitution of raiding team, its members and subsequent arrival, was a material piece of evidence in favour of prosecution. Indeed the daily diaries are maintained under the erstwhile Police Rules, 1934. Under Rule 28.48 it is mandatory for every police official to make entry of his departure, arrival and all proceedings conducted between the intervening period of departure and arrival. Non-production of the daily diary has caused serious doubts in the prosecution case regarding the mode and manner of raid.”

18. Upon a thorough and careful examination of the case, it becomes evident that the prosecution has failed to establish its case through reliable and compelling evidence. Furthermore, it is apparent that the trial court did not properly assess the evidence in its true context, leading to conclusions that are not supported by the evidence presented. Therefore, we have no hesitation in concluding that the prosecution has failed to prove that the charas was not in safe custody during the specified period. It is worth noting that even a positive report from the chemical examiner would not be sufficient to prove the prosecution's case, as stated in the case of *Basit Ali v. The State* (2023 P.Cr.L.J 683). Consequently, this court has overturned the conviction and sentence pronounced by the trial court, resulting in the acquittal of the appellant.

These are the reasons behind our short order dated 05.07.2023.

JUDGE

JUDGE

