

ORDER SHEET
IN THE HIGH COURT OF SINDH BENCH AT SUKKUR
Special Criminal Appeal No. D – 05 of 2023

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| Date | Order with signature of Judge |
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Before:

Mr. Justice Naimatullah Phulpoto, J

Mr. Justice Amjad Ali Bohio, J

Appellant : Mohammad Juman Khaskheli
Through Mr.Nisar Ahmed Bhanbhro, Advocate.

Respondent : The State Through Syed Sardar Ali Shah Rizvi

Date of Hearing : 18th July, 2023.

J U D G M E N T.

Amjad Ali Bhohio J:-Appellant Muhammad Jumman @ Jumo Khaskheli faced trial before the Court of Additional Sessions Judge-I/Special Judge for (C.N.S), Khairpur in Special Case No.63 of 2022. After full-dressed trial, vide judgment dated 01.02.2023, appellant was convicted for offence under Section 9(b) of the C.N.S Act, 1997 and sentenced to five (05) years RI and to pay fine of Rs.40,000/-.In case of default he was ordered to suffer S.I for six (06) months. Appellant was extended benefit of section 382 Cr.P.C.

2. The facts in brief of the prosecution case as emerged from the contents of first information report and the evidence adduced during the trial are that on 16.11.2021 complainant/ASI Roshan Ali Siyal along with police party left police station in Government mobile for patrolling duty vide roznamcha entry No.04 at 1000 hours. During patrolling when police party arrived beside Shahi Mahal situated at the link road leading from Mir Hazar Khan Bugti to Shahi Mahal at 1100 hour, appellant was found in possession of a light blue colour shopper. He tried to escape towards back but was chased and apprehended. On inquiry, he disclosed his name as Muhammad Jumman alias Jumo son of Jiand Khaskheli resident of Qasimabad taluka Kotdiji. Plastic shopper of light blue colour was opened which contained three pieces of charas. The recovered charas was weighed, it became 700 grams. Cash of Rs.500/- was also recovered from possession of appellant. Case property was sealed at the spot.

Appellant was arrested and Mashirnama of arrest and recovery was prepared in presence of mashirs. Thereafter, appellant and case property were brought at police station Kotdiji where FIR was lodged against him vide crime number 142/2021 under section 9 (b) of CNS Act,1997.

3. During investigation, the parcel containing charas was sent to the chemical examiner for analysis. Positive report was received. On the conclusion of investigation, Investigating Officer submitted the report under section 173 Cr.P.C.

4. Trial court framed charge against appellant on 11.03.2022 who, in response pleaded not guilty and claimed to be tried.

5. To substantiate it's case, prosecution examined complainant/ASI Roshan Ali (P.W 1, Exh.3), mashir/P.C Fayaz Ali Shah (P.W 2, Exh.4), I.O/ASI Akhtiar Hussain (P.W 3, Exh.5), and Dispatcher/P.C Aftab Hussain (P.W 4, Exh.6). The Special Public Prosecutor (S.P.P) then closed the prosecution's side of evidence with his statement (Exh.7).

6. In his statement recorded under Section 342 of the Cr.P.C, appellant claimed that the report of the Chemical Examiner was manipulated and denied the allegation regarding the recovery of the alleged Charas. However, appellant did not record his statement on oath in disproof of prosecution allegations and likewise did not lead evidence in his defence.

7. The trial Court after hearing the counsel for the parties and examining the evidence brought on the record, through impugned judgment has convicted and sentenced the appellant as stated above. Hence, this appeal is filed.

8. We have heard the counsel representing the appellant, the learned Deputy Prosecutor General (DPG) for the State and with their assistance have carefully examined the Record and Proceedings in Special Case No.63/2022.

9. According to the prosecution's account, the police party, led by ASI Roshan Ali, apprehended the appellant during patrolling on the Link Road that leads from Mir Hazar Khan Bugti towards Shahi Mahal. They recovered a light blue plastic shopper containing three pieces of Charas. Mashir PC Fayyaz Ali Shah stated that the complainant took approximately 10 to 15

minutes in sealing the case property and marking it. However, during their presence at the place of incident, no private person came across them. Such assertion creates a doubt in prudent mind, considering that the alleged Charas was recovered during daylight hours at 11:00 am on the link road.

10. According to the complainant, he handed over the parcel to the I.O/ASI Akhtiar Hussain on 16.11.2021 after the registration of the F.I.R. However, the evidence provided by the I.O is silent regarding the safe custody of the parcel till its dispatch to the Chemical Examiner. The I.O mentioned that he dispatched the parcel to the Chemical Examiner on next day i.e 17.11.2021, without explaining where he kept the parcel during the 24-hour period from 16.11.2021 to 17.11.2021. Furthermore, the I.O stated that he delivered the parcel to PC Aftab and made entry No.5, after which he left the Police Station at 10:30 hours for which he produced a document as Exhibit 5-D. However, the Chemical Report produced by the I.O indicated that the parcel was received through PC Aftab Hussain via memorandum/RC No. 43179 dated 17.11.2021. On the other hand, during cross-examination, the mashir of the recovery, PC Fayyaz Ali Shah, clearly testified that the SIO handed over the case property to him on 17.11.2021 at 1000 hours for depositing it in the Chemical Laboratory. It would be pertinent to mention that the evidence of the I.O was recorded after the evidence of mashir Fayyaz Ali Shah, but he failed to testify about R.C at Exhibit 4-B. As a result, the evidence of the I.O and mashir Fayyaz Ali Shah appears to be contradictory regarding the delivery of the parcel to the chemical examiner. In such a situation, if evidence of I.O is believed then credibility of the mashir becomes doubtful and unreliable. Safe custody of recovered substance as well as safe transmission have not been established before the trial Court.

11. It is well-established that in order to prove guilt in narcotic cases, the prosecution must prove the recovery through reliable evidence. Time and again it has been held by Superior Courts that even a single doubt in the case would make the prosecution evidence unbelievable and untrustworthy of credence. Mere recovery of narcotics is not the sole criterion for convicting an accused charged with trafficking of contraband. The prosecution must prove the recovery beyond reasonable doubt with

confidence-inspiring and reliable evidence, which unfortunately is not the case here due to the contradictions mentioned above.

12. Notably, the I.O failed to provide any information as to who kept the parcel in malkhana, even though an attested photocopy of entry No. 137 of Register No. 19 of malkhana was produced. Additionally, neither the statement of the incharge of malkhana was recorded nor he was produced as a witness to establish the safe custody of the parcel from 16.11.2021 to 17.11.2021. Moreover, there are two conflicting claims about the delivery of the sealed parcel to the chemical examiner – one from mashir Fayyaz Ali Shah, as mentioned earlier, and another from P.C Aftab Hussain, who stated that the case property in sealed condition, along with a letter and R.C, were delivered to him by the I.O, which he then deposited with the Chemical Examiner. These contradictions raise significant doubts about the proper delivery of the parcel to the chemical examiner. Failure of I.O to establish the safe custody of the parcel, leading to an apparent break in the chain of custody and safe transmission of the parcel in this case. In situations like this, the benefit should be given to the accused, as held by the Honorable Supreme Court of Pakistan in the case of Javed Iqbal v. The State (2023 SCMR 139). 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.”

13. Further upon close re-examination of the I.O.'s evidence, it is observed that during his cross-examination, he failed to recall the name of the person through whom he dispatched the parcel to the Chemical Examiner. Additionally, the I.O. also failed to recognize RC No. 43179 initially and stated that he dispatched the parcel under an RC bearing the number 121379. However, when R.C at Exhibit 3-E was shown to him, he then admitted that it bore RC No. 43179 and not 121379. This inconsistency raises doubts about the accuracy and reliability of the evidence provided by the I.O.

14. As a result, the prosecution has failed to prove the alleged recovery, and the trial court did not adequately consider the material discrepancies and loopholes in the prosecution's evidence, which shattered the reliability of prosecution evidence to prove the charge as against the accused.

15. In view of the above discussion and reasons, while allowing instant appeal, the impugned judgment is set aside and the appellant is acquitted of the charge. These are the reasons for our short order, announced on 18th July, 2023.

JUDGE

JUDGE