IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Spl. Crl. Jail Appeal No. D-85 of 2018

Present:-
Mr. Justice Muhammad Iqbal Kalhoro &
Mr. Justice Arbab Ali Hakro

Appellant	:	**Zanwar Hussain Pathan**, through Mr. Muhammad Rehan Khan Durrani, Advocate
The State	:	Through Mr. Aftab Ahmed Shar, Additional Prosecutor General

Date of hearing(s): **24.08.2023 & 07.09.2023**
Date of decision: **21.09.2023**

J U D G M E N T

MUHAMMAD IQBAL KALHORO, **J:-** Appellant Zanwar Hussain was tried by learned Sessions Judge / Special Judge (CNSA), Ghotki in Special Case No.35 of 2017, arising out of Crime No.11 of 2017 registered at DIO Camp Ubauro and vide judgment dated 06.07.2018, he was convicted for offence under Section 9(c) of the Narcotic Substances Act, 1997 and sentenced to suffer R.I for life and to pay fine of Rs. 100,000/-, in case of default, to further undergo S.I for four months with benefit of Section 382-BCrPC, duly extended to him.

2. As per brief facts, complainant posted as Excise Inspector at DIO Camp, Ubauro, while on a duty along with other staff, was busy in snap checking of vehicles near Excise Check Post Kamoon Shaheed Sindh-Punjab border on 22.08.2017. He stopped a car bearing registration No.LMA-418 (Suzuki Liana) coming from Sadiqabad-Punjab at about 1245 hours, and found appellant present on driving seat. On suspicion, he took search of the car and appellant and found, apart from necessary articles, 20 plastic packets, weighing one K.G each and containing two slabs of charas, in the trunk of the car. The total weight of 20 packets became 20 KGs. From each packet, 100 grams of charas as a sample for examination by chemical lab was separated and sealed. The remaining charas along with packets was put in a plastic bag and sealed on the spot. Appellant was formally arrested and then memo of

arrest and recovery was prepared by EC-Kifayat Ali on the dictation of complainant in presence of Mashirs EC-Mumtaz Ali and EC-Muhammad Daud. Appellant was subsequently brought at P.S. along with the recovered property and the car, seized under relevant memo, where FIR was registered accordingly against him.

3. During investigation, samples of charas were sent to the chemical lab, Rohri for examination and a report. Finally, on completion of investigation, the Challan was submitted in the Court for a trial, in the course of which a formal charge was framed against the appellant. He pleaded 'not guilty' and claimed trial. Hence, prosecution examined complainant as PW-1. He has produced memo of place of incident, FIR, report of chemical examiner, verification letter of documents of the car, departure and arrival entries etc. Second witness examined by the prosecution is EC-Muhammad Daud. The statement of appellant was recorded thereafter under Section 342 CrPC. He has simply denied the allegations and pled his innocence and false implication. The trial Court then vide impugned judgment has convicted and sentenced the appellant in the terms as above.

4. It may be stated before discussing merits of the case that in the Challan, one Mst. Ghosia, found to be owner of the car, was also referred to the Court and shown as absconder. She subsequently joined the trial and submitted relevant papers establishing sale of the car by her to one Muhammad Kashif Aijaz, which was confirmed by the I.O, hence she was acquitted under Section 265-K CrPC. Then Muhammad Kashif Aijaz was joined in the trial. The process was issued against him but he failed to appear and hence was declared as proclaimed offender, after due formalities.

5. Learned defence counsel has argued that appellant is innocent and has been falsely implicated in this case; complainant and I.O is the same person which points out to his interest in the case and *mala fide* on his part to involve the appellant; there are material contradictions in the evidence of witnesses which the trial Court has completely failed to appreciate; the prosecution has not examined all the witnesses who were allegedly part of the team, and with the complainant, on the day of incident; no private person was associated as a witness, even the officials from the Coast Guard, the Custom department and other law

enforcement agencies whose offices are adjacent to the place of incident, being Sindh-Punjab border, were not associated by the complainant to witness the recovery proceedings, hence the entire case is doubtful; the prosecution has utterly failed to establish safe custody of alleged recovered charas at P.S and its safe transmission to the office of chemical examiner; that Malkhana in charge was not examined by the prosecution, hence the case property is doubtful, and the prosecution case has become weak. He has relied upon cases *Abdul Ghani and others v. The State and others* (**2019 SCMR 608**) and *The State through Regional Director ANF v. Imam Bakhsh and others* (**2018 SCMR 2039**).

6. On the other hand, learned Additional P.G has supported the impugned judgment and has rebutted each point raised in defence by quoting the case law reported as **2020 SCMR 1222, 2022 SCMR 1097, 2022 SCMR 905, 2021 SCMR 1773, 2021 SCMR 128** and **2023 PCr.LJ 843.**

7. We have heard the parties and perused material available on record including the case law. In the lengthy arguments, raised in defence, in fact, learned counsel has not highlighted any material contradiction in the evidence of witnesses insofar as salient features of the case starting from performing duty at the relevant time to checking the vehicles at the subject place, flagging down appellant's car, its search and recovery of 20 packets from trunk of the car and appellant's utter failure to account for the same, are concerned. The complainant and Mashir both have supported each other on such facts without wavering on any one to create a room for a doubt. They have explained fully the details about their duty hours on the fateful day, proceeding to the place of incident, spotting appellant travelling in a car coming from Sadiqabad-Punjab, stopping the car and on checking of the same, recovering 20 packets of charas, each weighing one KG with two slabs, separating samples of 100 grams from each packet, sealing them separately from the remaining charas. In cross-examination, nothing of the sort derailing the prosecution case or depriving it of its intrinsic value qua the charge has come on record. Although, they have been subjected to a reasonably lengthy cross-examination, but except the trivial variations in describing the minuscule details surrounding the incident, nothing substantial endangering the prosecution case has

been brought on record. Arrest of appellant at the spot in the wake of discovery of the charas from his car, both stand established from the evidence of P Ws. There is nothing to show that appellant has been falsely implicated in this case out of any ill-will or mala fide on the part of the complainant. His dual capacity of being I.O as well is not prejudicial to appellant as no law prohibits him from doing so.

8. To the contention of learned defence counsel that not all the members of complainant's team have been examined in the trial, it may be said that it is always prerogative of the prosecution to examine as many as witnesses as it deems necessary to prove the charge. The accused cannot take a shelter behind a plea that a particular witness has not been examined and it has rendered the case doubtful. Not least, when he is afforded an ample opportunity in terms of Section 342 CrPC to rebut the charge and request the Court to send for that witness to give evidence and vouch for his stance, if any.

9. Further, as to the point of safe keeping of the recovered property at Malkhana and its safe transmission to the chemical lab, the Supreme Court in case of *Liaquat Ali and another v. The State* (**2020 SCMR 1097**) has held that non-compliance of the Control of Narcotic Substances (Government Analysts) Rules, 2001, which are directory and not mandatory, would not *ipso facto* imply falseness of the whole prosecution case, which, otherwise, is based on unimpeachable evidence of the witnesses giving firsthand account of the incident in unambiguous words.

10. Then in the case of *Zain Ali v. The State*, the Supreme Court vide judgment dated 29.05.2023 (Crl. Appeal No.208 of 2022) after elaborately discussing the issue of safe transmission and failure of the prosecution to examine the carrier who had delivered the property to the chemical lab for analysis has observed that record shows that parcels of samples were sealed at the spot and the same were received by the chemical examiner in a sealed condition which established safe communication of the samples. In both the aforesaid cases, the point of safe keeping of the property at Malkhana and its safe transmission in view of documents showing sealing of the property at the spot and its delivery at chemical lab with seals duly intact have been accepted by the Supreme Court and the conviction has been maintained.

11. In this case, the record shows that recovery was effected from appellant on 22.08.2017 at about 1245 hours, and the next day i.e. 23.08.2017 the samples were sent and received at the lab for examination. Within 24 hours, the samples, which were sealed at the spot, were thus conveyed to the lab with seals intact. There is hardly any chance of tampering with the samples in such a short period. Even otherwise, nothing substantial subverting safe custody at P.S or safe conveyance of the property to the lab, which otherwise, do not seem to have been disrupted at any moment, has even been brought up in defence except that the Malkhana in charge and carrier who took the property to the lab have not been examined. When an accused denies wholly and solely recovery of the property from him, we wonder is it open to him to question its safe transmission to the lab and safe custody at P.S. Because, both these projections are paradoxical to each other and for the most part illogical. If his case is that no narcotics was recovered from him, and the one shown in the case has been foisted upon him, the question of its safe keeping at P.S or conveyance to the lab for examination would not arise for him to raise. Unless of course, his case is that although the recovery of narcotics was effected from him, but while keeping it at P.S or being taken to the lab, it was fiddled with, with a view to strengthen the case against him.

12. But, in any case, whether the accused happens to admit recovery from him or not, and it is the Court, which as an abundant caution, desires to examine this aspect of the case for safe administration of justice. The first question which the Court shall think over in such a case should be why the police would like to tamper with the property and spoil its own case. Because, to tamper with the property at P.S by the police would amount to destroying its own case as such act is bound to work out in favour of the accused rather than the prosecution. Then, the next question to be asked should be why the Court shall look for something not brought up in defense perceptibly and deduct (tampering of the property) without any material pointing out to the same and discard the prosecution case, which is otherwise built on strong structure. Linked to above contemplations would be then the question that would it be safe to doubt the prosecution case just because Malkhana in charge has not been examined in the trial to depose the safe keeping of the property, when otherwise there is no

material even remotely hinting at such a probability i.e. meddling with the property at P.S. Does non-examination of Malkhana in charge automatically imply tampering of the property or failure of the prosecution to prove its safe keeping at P.S? In our view, unless there is material evidently suggesting such a scenario, nothing would be presumed or deducted on the basis of vague plea of tampering of the property at P.S. or its safe transmission to the lab. When the prosecution has established recovery from possession of the appellant at the spot, its sealing there and conveyance ultimately in the lab in the sealed condition and there is no material suggesting that any fiddling was done to the property at P.S by the police with a view to improve its case and to wangle the result at the chemical lab, there would be no justification for the Court to hypothesize maneuvering of the property or count non-examination of Malkhana in charge as a failure of the prosecution to prove the charge of recovery.

13. Before us, there is clear cut evidence of the witnesses establishing recovery of charas from the appellant on the fateful day. The argument in defence that non-examination of Malkhana in charge shall necessarily lead to an inference of the property being tampered with, in view of above discussion, is unsustainable and illogical. We see no reason to accept the failure of the prosecution to examine Malkhana in charge as its failure to keep the property safe at police station. The chemical examiner's report shows that the property within 24 hours was received and seals were found intact. The safe communication from such documentary record is established and non-examination of the carrier who took the property to the lab would not undermine this established fact, and otherwise the strong case of recovery of the property from the appellant. We, therefore, are of the view that the prosecution has been successful in establishing its case against the appellant and the impugned judgment does not warrant any interference.

14. Consequently, this Special Criminal Jail Appeal being devoid of any force is **dismissed** accordingly**.**

JUDGE

JUDGE

Ahmad