

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

**Spl. Cr. Jail Appeal No. D – 27 of 2023**

*Present:*

**Mr. Amjad Ali Bohio, J.**

**Mr. Arbab Ali Hakro, J.**

Appellant : Nadir Hussain S/o Abdul Latif Bhangar,  
through Mr. Rukhsar Ahmed Junejo,  
Advocate.

Respondent : The State through Mr. Aftab Ahmed Shar  
Additional Prosecutor General.

Date of hearing : **10.07.2024**

Date of decision : **10.07.2024**

### **J U D G M E N T**

**AMJAD ALI BOHIO, J :** Appellant Nadir Hussain through instant appeal has assailed the judgment dated 15.05.2023 passed by Special Judge for (Control of Narcotic Substances), Khairpur in Special Case No.233 of 2022, arising out of FIR No. 22 of 2022, registered at Police Station F.M.Narejo, Khairpur, whereby the appellant was convicted for an offence under Section 9(d) of CNS (Amendment 2022) Act, 1997 and awarded Rigorous Imprisonment for fourteen (14) years. He was also directed to pay fine of Rs.2,00,000/- and in default of payment he is required to undergo simple imprisonment for one year more. Benefit of Section 382-B, Cr.P.C. was extended to accused.

2. The brief facts of the prosecution case as emerged from the contents of the FIR are that on 20.10.2022 at 1100 hours, complainant / ASI Gulsher Maitlo along with his team proceeded from police station in official vehicle for patrolling duty vide entry No.05 and via link road leading from Kot Mir Muhammad to Piryaloi arrived at 'Jaamra Mor' where they received spy information that a person having two bags (gunny plastic bags) containing Bhang (Hemp) was waiting for conveyance near 'Odha Mor' to sell the same. On such information they arrived on pointed place at 1200 hours and found a person standing there beside whom, two

filled gunny plastic bags were lying. On seeing the police party he by leaving the bags, tried to escape towards banana garden but was chased and apprehended. On enquiry, he disclosed his name as Nadir Hussain S/o Abdul Latif Bhangar, resident of village Rahim Bux Bhangar, Taluka Kingri, and admitted that he used to sell Bhang (Hemp). They weighed the recovered Bhang (Hemp) which measured to be 21000 grams. From personal search, cash of Rs.150/- was secured. Recovered Bhang (Hemp) was sealed and such mashirnama of recovery and arrest was prepared. The appellant along with recovered property was brought at Police Station. Case was registered against appellant Nadir Hussain Bhangar under section 9(d) of CNS (Amendment) Act, 2022 as mentioned above. The recovered Bhang (Hemp) was sent to the Chemical Analyzer whose report was positive.

3. After completion of investigation, Investigating Officer submitted the report under Section 173, Cr.P.C against the appellant before the learned trial court at Khairpur. The charge was framed against the appellant on 11.01.2023, to which he pleaded not guilty and claimed trial of the case.

4. To substantiate it's case, the prosecution examined complainant / ASI Gulsher Maitlo (**PW-1**), mashir / PC Saifullah Laghari (**PW-2**), IO / SIP Shah Nawaz (**PW-3**) and Incharge Malkhana / WHC Nazar Muhammad. They exhibited numerous documents and other items and thereafter closed its side of evidence on 31.03.2023. The statement of the appellant was recorded under Section 342 of Cr.P.C, in which he denied all the allegations leveled against him and claimed false implication. However, the appellant did not record his statement on oath in disproof of prosecution allegations and likewise did not lead evidence in his defence.

5. The trial court after hearing the learned counsel for the parties and examining the evidence brought on the record, through impugned judgment dated 15.05.2023 convicted the appellant and sentenced him as earlier set out in this judgment. Hence, this appeal against conviction has been filed by the appellant.

6. The facts of the case as well as evidence produced before the trial Court find an elaborate mention in the impugned judgment passed by the trial court and, therefore, the same is not to be reproduced here so as to avoid unnecessary repetition.

7. We have heard the learned Counsel representing the appellant, learned Additional Prosecutor General and with their assistance have carefully examined the entire available record.

8. Learned counsel for the appellant has contended that the appellant is innocent and has not committed the alleged offence; that the prosecution has failed to prove its case against the appellant beyond a reasonable doubt especially as the safe custody of property and its transmission to the office of the Chemical Examiner has not been proved; that the despatcher failed to depose as to whether property was entrusted to him for its delivery to the Chemical Examiner. Lastly he submitted that the case of the prosecution was thus marred by gaps and defects and under such circumstances there was no reason to convict the appellant.

9. Conversely, the learned APG defended the impugned judgment and relying on the report of the Chemical Examiner contended that the parcel received was found to contain Bhang (Hemp), which is sufficient to establish the guilt of the appellant so as to prove the charge against him, hence his conviction ought to be sustained.

10. Having considered the matter in light of the record, we have observed that whilst the two prosecution witnesses furnished their testimony as to the recovery of Hemp(Bhang), and the investigation steps taken thereafter, the chain of custody remains shrouded in mystery as nothing was brought on record to show why the parcel was kept in malkhana for 04 (four) days prior to being sent to the Chemical Examiner, and even the official who is claimed to have taken the parcel to the office of the Chemical Examiner was not examined as witness. Needless to note that, for the Chemical Examiner's Report to have real probative value, the sanctity of the chain of custody is absolutely imperative. It is prosecution's responsibility

that such chain of custody must be safe and secure because the report of the Chemical Examiner carries critical importance under the Act, 1997, and the proof of chain of custody can only ensure the reaching of recovered material to the office of the Chemical Examiner. We are fortified in this regard by the Judgment of the Honourable Supreme Court in the cases reported as The State through Regional Director ANF v. Imam Bakhsh and others (2018 SCMR 2039), as well as, a more recent Judgment in **Criminal Appeal No.184 of 2020**, titled Mst. Sakina Ramzan v. The State, wherein it was held as under:

*“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.”*

11. In narcotic cases it is the duty of prosecution to establish the seizure of contraband, taking of samples from the recovered stuff, their safe transmission from the spot to the police station and from police station to the Chemical Examiner, however, as stated above in the present case, I.O dispatched the parcel to the laboratory through PC Saifullah, who in his examination-in-chief has not uttered a single word that I.O delivered the parcel to him on 24.10.2022 and he delivered the same to the Chemical Examiner. Thus, the prosecution admittedly failed to adduce evidence of dispatcher in order to corroborate the chain of custody of property as unbroken, for which prosecution was liable to prove the safe custody and transmission of sealed sample parcel to the Chemical Examiner. I.O also failed to explain the delay of four (04) days for keeping the parcel with

malkhana, therefore, the elements of tampering with the parcels cannot be ruled out and thereby such defect on the part of prosecution, cannot be held with any degree of certainty that the prosecution had succeeded in establishing its case against the accused beyond any reasonable doubt as held in the case of Muhammad Hazir v. The State (2023 SCMR 986) as under:

“3. After hearing the learned counsel for the appellant as well as the learned state counsel and perusing the available record along with the impugned judgment with their assistance, it has been observed by us that neither the safe custody nor the safe transmission of the sealed sample parcels to the concerned Forensic Science Laboratory was established by the prosecution because neither the Moharrar nor the Constable Shah Said (FC-2391) who deposited the sample parcels in the concerned laboratory was produced. It is also a circumstance that recovery was affected on 10.02.2015 whereas the sample parcels were received in the said laboratory on 13.02.2015 and prosecution is silent as to where remained these sample parcels during this period, meaning thereby that the element of tampering with is quite apparent in this case. This Court in 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)*, *Ekramullah and others v. The State (2015 SCMR 1002)* and *Amjad Ali v. The State (2012 SCMR 577)* has held that in a case containing the above mentioned defect 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.”

12. Perusal of the record further reflects that there are material contradictions in the evidence of complainant / ASI Gulsher and mashir / PC Saifullah. According to complainant, the distance between Police Station and place of incident is about three (03) kilometers, whereas mashir / PC Saifullah deposed that said distance is only one (01) kilometer. The complainant deposed that he prepared memo of arrest and recovery with the help of clipboard in standing position, whereas the mashir deposed that memo was prepared by the complainant over bonnet of mobile vehicle. Though the evidence of complainant and mashir was recorded within four months of the alleged incident, yet their contradictory evidence make their presence at the time of alleged incident as doubtful.

13. From the above discussion, it is evident, that there are serious doubts in the case of prosecution. It is settled law that even a single doubt in the prosecution story is disastrous for the prosecution case and its benefit must go to the accused. In this respect, we would like to take reliance from a case of Apex Court reported as Tariq Pervez v. The State (1995 SCMR 1345), wherein it is held as:

*“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 doubts. 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.”*

14. In the present case, there are series of circumstances creating doubts, and under the settled principle of criminal justice, the benefit of the doubt favours the appellant.

15. The final and eventual outcome of the entire discussion is that we are unable to agree with the findings and conclusions reached at by the learned trial Court and the same are unsustainable which vitiate the impugned judgment. We, therefore, allow the instant appeal. Resultantly, the judgment of the learned trial Court convicting and sentencing the appellant is set aside, and the appellant was acquitted of the offences for which he has been charged vide our short order dated 10.07.2024 and these are the reasons for the same.

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Abdul Basit