

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No. 521 of 2022

PRESENT:

Mr. Justice Naimatullah Phulpoto
Mr. Justice Khadim Hussain Tunio

Rameez Arshad ...*Appellant*
versus
The State ...*Respondent*
For the Appellant: Mr. Hussain Bux Baloch, advocate.
For the Respondent: Mr. Ali Haider Saleem, APG Sindh
Date of Hearing: 16.04.2024

JUDGMENT

KHADIM HUSSAIN TUNIO, J- The appellant was convicted of an offence of possession of chars contrary to section 6 and punishable under section 9(c) of the Control of Narcotic Substances Act 1997 (“**the 1997 Act**”) in Sessions Case No. 570 of 2021 by the VIIIth Additional Sessions Judge, Karachi West (“**Trial Court**”). He was sentenced to life imprisonment along with a fine of rupees one lac, defaulting which he was to serve an additional simple imprisonment for six (06) months vide judgment dated 19.07.2022 (“**impugned judgment**”). He was also extended benefit of Section 382-B, Cr.P.C.

THE FACTUAL HISTORY

2. On the evening of 7 April 2021 in Ittehad Town’s Afridi Chowk at just after 7.30pm, a motorcycle was signaled to stop by Excise Inspector Syed Fayaz Hussain Shah with one occupant on board. The occupant disclosed his name to be Rameez Arshad. Prior to the stop, the Excise Inspector had been tipped off by an informant of a man who would come there for the supply of narcotics. This was, admittedly, the reason for the stop and search. On the fuel tank of the motorcycle, a white sack lay which was seized and searched. Therein, police allegedly found 20 red packets which they cut and found to be packed with chars. Rameez was also searched and from his personal possession, rupees four thousand rupees in cash and a mobile phone were seized. The seized property was brought to the police station along with Rameez where the FIR was lodged.

3. Inspector Syed Fayaz Hussain Shah investigated the matter himself and sent the recovered contraband to the chemical examiner on 08.04.2021 through Constable

Bharat Kumar and collected the positive report dated 22.04.2021. He also recorded 161 CrPC statements of the witnesses, obtained the previous criminal record of the appellant and prepared all the entries of departure and arrival along with the memo of arrest and recovery.

THE TRIAL

4. On 25 August 2021 the appellant was charged and the trial commenced. Prosecution examined (1) Excise Inspector Syed Fayaz Hussain, the complainant who was also the investigation officer and (2) AETO Ahmed Yar Khoso, Mashir. Then, statement of the appellant was recorded under section 342 of the Code of Criminal Procedure (“CrPC”) wherein he refuted the truthfulness of the report, stating that it was false and managed, stated that the police officials were falsely deposing against him and that he did not possess any narcotics. However, he did not opt to be examined on oath nor produced any witnesses in his defence. He was convicted thereafter by the Trial Court.

ARGUMENTS

5. We heard the counsel for the appellant, who asserted that the trial proceedings were conducted in an irregular manner, and that various witnesses for the prosecution were not subjected to examination. Learned counsel further contended that the safe retention of the recovered contraband is dubious, given the absence of an entry of the property register-19. Finally, counsel highlighted that PW-2 AETO Ahmed Yar, during cross-examination, admitted that the case property was not relinquished to his custody, despite his position as the person in charge of the malkhana.

6. APG Sindh provided tepid support for the prosecution's case, alleging that the subject property was retained in the malkhana by the complainant; that no malice or enmity has been attributed to the excise officials; that a substantial quantity has been recovered from the appellant; and that the chemical examiner's report was affirmative, substantiating that the recovered contraband was indeed chars.

7. The learned Judge gave a pithy ruling on 19.07.2022. He began by underlining the facts of and summarizing the evidence of the prosecution witnesses. While considering the argument regarding contradictions in the evidence, he noted that the same were “minor in nature” and had occurred due to “passage of time.” Referring to the arrest and recovery, the learned Judge noted that the same was pursuant to an informant’s tip off and that the evidence of the police officials completely corroborated each other and all the other material available on the record. In paragraph 16 of the ruling, the learned Judge noted that “all relevant entries” had

been exhibited, and went on to note in paragraph 20 that the entry of register-19 was not produced and that in his opinion “it [was] not affecting the merits of the case.”

DISCUSSION

8. After having entertained submissions from both counsel regarding the merits of the appeal, we are not persuaded of the legitimacy of the prosecution's case, nor are we satisfied with the veracity of the facts presented by the prosecution. The case was fundamentally compromised from its inception, as the very act of recovery was rendered meaningless by the subsequent failure to deposit the contraband in the evidence repository. While arguments to the contrary were presented, they ultimately lacked sufficient substantiation. In a typical narcotics case, three fundamental questions demand resolution: firstly, the nature of possession - namely, the origin of the contraband, its location of recovery, and the identity of the individual from whom it was seized. Secondly, the chain of custody - the documented trail of the contraband's whereabouts following its recovery. Only upon satisfactory answers to these first two questions can we address the final inquiry: the nature of the recovered contraband, in essence, the specific type of narcotics which is usually answered by the result noted in the chemical examiner's report.

9. The chars is alleged to have been recovered on the 7th of April and was sent to the chemical examiner on the 8th. The alleged recovery transpired in close proximity to a bus stop located at Afridi Chowk. The contraband was purportedly discovered within an open sack situated atop the fuel tank of the motorcycle driven by the appellant. The two witnesses examined during the trial testified that the sack was open, and upon the identification of its contents as chars, was subsequently sealed for forensic examination. Both witnesses further deposed that the subject property was deposited within the malkhana. Inspector Syed Fayaz Hussain Shah asserted his personal responsibility for the deposit, a claim corroborated by AETO Ahmed Yar, the mashir of arrest and recovery who also serves as the malkhana incharge. However, a critical contradiction arises from the latter's own admission: despite his designated role in ensuring the proper deposit of evidence as the incharge, he was never entrusted with physical custody of the case property. This discrepancy irrefutably undermines any potential evidentiary value associated with the alleged recovery. The learned Judge erred in attributing the discrepancies within the prosecution witnesses' testimonies to a mere lapse of time. Given that both the incident and the recording of evidence occurred within a single year, this rationale lacks merit. Therefore, we do not concur with the Trial Court's opinion on this particular issue.

9.1. Notwithstanding the aforementioned inconsistencies, we undertook a further inquiry to ascertain whether the chain of custody could be established through alternative means. Regrettably, we discovered yet another significant omission: the property register-19 entry pertaining to the alleged contraband was inexplicably absent from the court record. The witnesses were never subjected to cross-examination regarding this critical aspect by the defence and the onus for such an oversight rests equally upon the prosecution, for failing to present a comprehensive case, and upon the defense counsel, whose representation of the appellant fell short of the expected standards. As previously noted, we have already emphasized the paramount importance of establishing a secure chain of custody in all narcotics cases; *see Muhammad Hazir versus The State (2023 SCMR 986) if any authority is needed*. This imperative requirement can be satisfied through various methods, including the examination of the malkhana incharge, the production of the property register-19 entry documenting the deposit of the narcotics, or the testimony of a designated dispatch officer who can confirm the placement of the case property within the malkhana before taking it to the chemical examiner under receipt. In its judgment, the Trial Court determined that all essential entries pertaining to the case had been presented. The court, within paragraph 16 of the impugned judgment, specifically identified "departure and arrival entries" as constituting such essential entries. However, the Trial Court subsequently contradicted this assertion within paragraph 20, where it inexplicably deemed the absence of an entry within property register-19 to be inconsequential. We are unable to concur with the Trial Court's latter opinion for the reasons previously articulated. The entry within register-19 assumed critical significance within the context of this case because the prosecution, despite having examined the malkhana incharge, demonstrably failed to satisfy its burden of proof regarding the secure chain of custody through any alternative means. Chain of custody begins with seizure of the narcotics, storage of the same with the law enforcement agency and finally its dispatch to the office of the chemical examiner.^[1] While deposing regarding the deposit of the case property in the malkhana, Inspector Fayaz makes no mention of the time and date of such deposit, details which are otherwise explicitly mentioned in the entry.

9.2. Earlier, we identified three questions that necessitate a conclusive response for a successful prosecution. The initial question, regarding the exclusivity of the alleged recovery from the appellant's possession, presented a relatively straightforward determination. However, as extensively discussed above, the prosecution's failure to establish a secure chain of custody definitively resolves the second inquiry with a singular answer: the prosecution has fallen short of its burden

^[1] See Sakina Ramzan v. The State, 2021 SCMR 451

of proof. Only upon a satisfactory resolution of these first two questions can we proceed to the final inquiry: the definitive identification of the recovered contraband as a narcotic substance, but why? To establish the legitimacy of the evidence; before a court can analyze evidence regarding the nature of a substance, it must first ensure that the evidence presented is the same as what was originally seized. An unbroken chain of custody provides that guarantee. The *locus classicus* for this observation is the case of *Imam Baksh* (2019 SCMR 2004). At paragraph 9 of the judgment, it was explicitly observed by the Supreme Court that any break in the chain of custody:

“[...] will cast doubts on the safe custody and safe transmission of the sample(s) and will impair and vitiate the conclusiveness and reliability of the Report of the Government Analyst, thus, rendering it incapable of sustaining conviction.”

9.3. These views had earlier been expressed in the cases titled “*Ikramullah versus The State*” (2015 SCMR 1002) and “*Amjad Ali versus The State*” (2012 SCMR 577).

PREJUDICE IN INVESTIGATION

10. The record clearly demonstrates that Inspector Fayaz, the complainant in this matter, not only apprehended the appellant with the alleged contraband but also assumed the role of investigating officer. While no express legal prohibition exists against such a dual role, the potential for impropriety is significant. The principle of procedural fairness dictates that the complainant's investigative actions must not cause prejudice to the accused.^[2] Inspector Fayaz demonstrably failed to uphold this standard, creating an environment ripe for procedural prejudice towards the appellant. The prior discussion supports the inference that he either failed to deposit the contraband into the malkhana or neglected the mandatory documentation of this deposit in Property Register-19. Furthermore, as the investigating officer, he possessed the power to record witness statements under section 161 CrPC, a process offering the potential for manipulation or undue influence in the absence of oversight. A prejudicial investigation has the insidious ability to severely compromise the fundamental right to a fair trial as guaranteed under Article 10-A^[3] because when an investigation is tainted by bias, procedural errors, or deliberate manipulation, it undermines the integrity of evidence and the presumption of innocence, which is the cornerstone of administration of justice.^[4] A fair trial demands a level playing field, and prejudicial investigative practices irrevocably tilt the scales against the accused.

^[2] See *Zafar v. The State* (2008 SCMR 1254); @ para 11 citing *State through Advocate-General Sindh v. Bashir and others*, PLD 1997 Supreme Court 408.

^[3] Constitution of Islamic Republic of Pakistan

^[4] *Suo Motu Case No. 5 of 2012*, PLD 2012 Supreme Court 66.

10.1. In light of the circumstances presented within this case, we find that it was patently improper for Inspector Fayaz to have investigated the crime of which he was the complainant.

DISPOSITION

11. All the above noted factors create more than reasonable doubt in the prosecution case and there can be no cavil to the proposition that a criminal case has to be proven beyond reasonable doubt. The favour of any doubt in the prosecution case goes to the accused as a matter of right because he is the favourite child of the law. A reference to the case of *Muhammad Riaz versus Khurram Shehzad*^[5] we deem appropriate:

“[...] the farsightedness and prudence, ‘let a hundred guilty be acquitted but one innocent should not be convicted’; or that it is better to run the risk of sparing the guilty than to condemn the innocent. The *raison d'être* is to assess and scrutinize whether the police and prosecution have performed their tasks accurately and diligently in order to apprehend and expose the actual culprits, or whether they dragged innocent persons in the crime report on account of a defective or botched-up investigation which became a serious cause of concern for the victim who was deprived of justice. The philosophy of the turn of phrase “the accused is the favourite child of law” does not imply that the Court should grant any unwarranted favour, indulgence or preferential treatment to the accused, rather it was coined to maintain a fair-minded and unbiased sense of justice in all circumstances, as a safety gauge or safety contrivance to ensure an even-handed right of defence with a fair trial for compliance with the due process of law, which is an integral limb of the safe administration of criminal justice and is crucial in order to avoid erroneous verdicts, and to advocate for the reinforcement of the renowned doctrine “innocent until proven guilty”.”

11.1. Therefore, no compelling arguments have been presented before this Court to warrant the upholding of the appellant, Rameez Arshad's, conviction. Having demonstrably failed to establish a case against the appellant for possession of narcotics in contravention of section 6 of the 1997 Act, the Trial Court's conviction of the appellant could not be sustained and was set aside by our short order dated 16.04.2024 with the above being the reasons therefor.

POSTSCRIPT

12. We voice here a concern which although had no bearing on our decision on the appeal, but is of significance. We observe a recurring trend in cases presented before this court in relation to the authored judgments. The points for determination, as formulated, are typically mere replicas of the charge, offering no additional insight. “Points for determination” should mean all important questions involved in a

^[5] 2024 SCMR 51

case.^[6] When a Court fails to establish a clear roadmap for its own reasoning, it risks neglecting crucial aspects of the case at hand. The necessity for clear and distinct points of determination is of paramount importance. Section 367 CrPC not only mandates a separate decision on each point but also necessitates, by clear inference, the proper and precise framing of these points. It is hoped that this issue will be addressed robustly.

Judge

Judge

KARACHI
16th April, 2024

^[6] Justice Shafiur Rahman, "Decision and Judgment," <https://www.fja.gov.pk/files/articles/Decisionandjudgment.pdf>.