

# IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

**Spl. Cr. Jail Appeal No. D – 77 of 2023**

*(Asif Ali alias Muhammad Asif Memon v. The State)*

Present:

**Mr. Zulfiqar Ahmad Khan, J.**

**Mr. Khadim Hussain Tunio, J.**

Date of hearing : **11.12.2024**

Date of decision : **11.12.2024**

Mr. Rukhsar Ahmed Junejo, Advocate for appellant.

Mr. Aftab Ali Shar, Additional Prosecutor General.

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

**Zulfiqar Ahmad Khan, J.** – Through this appeal, the appellant Asif Ali alias Muhammad Asif, son of Amanullah Memon, challenges the judgment dated 03.11.2023, rendered by learned Additional Sessions Judge-I (MCTC) / Special Judge for CNS, Khairpur, in Special Case No. 33 of 2023 (*Re: Asif Ali @ Muhammad Asif v. The State*), arising out of Crime No.78 of 2022, registered at Police Station Baberloi under Section 9(c) of CNS Act. In the challenged judgment, the appellant was convicted and sentenced to undergo rigorous imprisonment for a period of seven (07) years, along with a fine of Rs.1,00,000/- (Rupees one lac). In the event of default in payment, the appellant was ordered to undergo an additional six months of simple imprisonment. However, the benefit of Section 382-B, Cr.P.C. was extended to him.

2. The concise facts of the case are that on 17<sup>th</sup> October 2022, at about 05:10 PM, the appellant was arrested by ASI Imdad Ali Jagirani and his team during a routine patrol near the abandoned bungalow of Larik, located in a date palm garden along the Ubhri-Shah Ladhani link road. The appellant was found in possession of 16,000 grams of hemp, which was found in a sack he was carrying, along with Rs.200 in cash. The sack was sealed for sending to chemical examiner. A memo of the arrest and recovery was prepared at the site, and the appellant, along with the recovered hemp, was taken to Police Station Baberloi, District Khairpur, where an FIR (Crime No.78 of 2022) was registered under Section 9(c) of the Control of Narcotic Substances Act.

3. Following the registration of the FIR, the investigation was assigned to SIO Nazir Ahmed Bhayo, who, after completing the investigation, submitted the challan to the relevant Court. Upon the commencement of the trial, a formal charge was framed against the appellant. However, the appellant denied the charges and opted not to plead guilty, instead requested the prosecution to present its evidence.

4. The prosecution examined five witnesses: complainant (ASI Imdad Ali Jagirani), mashir (HC Sadaruddin Shar), who was present during appellant's arrest, recovery of the contraband and inspection of the crime scene, Investigating Officer (SIO Nazir Ahmed Bhayo), property dispatcher (PC Ghulam Sarwar Thebo) and In-charge Malkhana (WHC Ghulam Hyder Thebo). They presented various documents, including the entries, arrest memo, FIR, inspection memo, letter to the chemical examiner, RC, chemical report and the entry in Register Book No.19.

5. The appellant's statement was recorded under Section 342, Cr.P.C, where he denied all the incriminating evidence presented against him. As a result, at the conclusion of the trial, the appellant was convicted and sentenced as detailed in the impugned judgment.

6. Learned Counsel has argued that the appellant is innocent and has been falsely implicated in this case. He has further contended that there are material contradictions in the evidence of the witnesses. Additionally, the contraband was sent to the chemical examiner with a significant delay, without any plausible explanation, which raises concerns about the reliability of the evidence. The safe custody of the property is also under question. He has lastly submitted that it is settled law that when a circumstance introducing doubt arises in the case, its benefit must be extended to the accused, not as a matter of grace, but as a matter of right. He, therefore, prayed for acquittal of the appellant.

7. Learned Additional Prosecutor General has strongly opposed the arguments presented by learned defense Counsel. He has defended the impugned judgment, emphasizing the sufficiency and credibility of the evidence presented during the trial. Learned Additional Prosecutor General has argued that the appellant's conviction was well-supported by the testimonies of the prosecution witnesses and the recovered contraband. Consequently, he prayed for the dismissal of the appeal, urging that the conviction and sentence be upheld.

8. We have carefully heard the learned Counsel for the appellant as well as learned Additional Prosecutor General, and also perused the material available on record.

9. ASI Imdad Ali Jagirani (complainant) testified that he recorded the custody of the accused and the case property under entry No.15 and, under entry No.16, he handed over the case property and the accused to SIO Nazir Ahmed Bhayo (Investigating Officer). SIO Nazir Ahmed Bhayo confirmed receiving the case property and placing it in the Malkhana through WHC Ghulam Hyder Thebo. However, WHC Ghulam Hyder Thebo, In-charge of the Malkhana, confirmed receiving the case property on 17.10.2022 and subsequently handing it over on 21.10.2022. Notably, he did not mention SIO Bhayo in his testimony and instead linked both the receiving and handing over of the property directly to ASI Jagirani.

10. In criminal cases involving narcotics, maintaining an unbroken chain of custody is essential to ensure that the evidence presented in Court is credible and has not been tampered with. The discrepancies in the handling of the case property, especially the wrongful handover to the ASI instead of the SIO, along with the lack of clarity in the records, introduce reasonable doubt as to the integrity of the evidence. These procedural flaws are critical because they affect the reliability of the evidence and ultimately the appellant's right to a fair trial.

11. In addition to the above, two other discrepancies have emerged. The SIO claimed that there was "no overwriting" on the memo of inspection of the place of incident, but a close examination of the document reveals that the date was altered from 18 to 17. Furthermore, during cross-examination, WHC Ghulam Hyder Thebo admitted that Serial No.24 of Register Book No.19 did not indicate the time at which the case property was deposited. This omission is significant because accurately recording such entries is essential for maintaining the chain of custody and ensuring that the evidence has not been tampered with. These discrepancies further undermine the reliability of the evidence presented.

12. The Hon'ble Supreme Court in the case of *Qaiser and another v. The State* (2022 SCMR 1641), while dilating upon safe custody, has held as under:

“4. ....The chain of custody of sample parcels begins from the recovery of the narcotics by the police including the separation of

*representative samples of the recovered narcotics, their dispatch to the Malkhana and further dispatch to the testing laboratory. The said chain of custody and transmission was pivotal as the entire construct of the Act 1997 and the Control of Narcotic Substances (Government Analysts) Rules, 2001 (Rules 2001), rests upon the report of the analyst. It is prosecution's bounded duty that such chain of custody must be safe and secure because the report of chemical examiner enjoined critical importance under the Act 1997, and the chain of custody ensure the reaching of correct representative samples to the office of chemical examiner. Any break in the chain of custody i.e. the safe custody or safe transmission of the representative samples, makes the report of chemical examiner worthless and un-reliable for justifying conviction of the accused, Such lapse on the part of the prosecution would cast doubt and would vitiate the conclusiveness and reliability of the report of chemical examiner. Reliance can be made upon the judgments rendered by three members benches of this court i.e. Ikramullah v. The State (2015 SCMR 1002), The State v. Imam Bakhsh (2018 SCMR 2039), Abdul Ghani v. The State (2019 SCMR 608), Kamran Shah v. The State (2019 SCMR 1217), Mst. Razia Sultana v. The State (2019 SCMR 1300), Faizan Ali v. The State (2019 SCMR 1649), Zahir Shah alias Shat v. State through A.G. Khyber Pakhtunkhwa (2019 SCMR 2004), Haji Nawaz v. The State (2020 SCMR 687), Qaiser Khan v. The State (2021 SCMR 363), Mst. Sakina Ramzan v. The State (2021 SCMR 451), Zubair Khan v. The State (2021 SCMR 492) and Gulzar v. The State (2021 SCMR 380).”*

13. One of the key points of contention is the delay in sending the case property to the Chemical Examiner. According to the testimony of SIO Nazir Ahmed Bhayo, the case property was dispatched to the Chemical Examiner Laboratory, Rohri on 21.10.2022, through PC Ghulam Sarwar Thebo. However, this was a delay of four days from the date of the arrest (17.10.2022). In normal circumstances, the property should have been dispatched to the laboratory within 72 hours to maintain the integrity of the evidence and prevent any tampering. The delay of more than 72 hours, without any plausible explanation, casts doubt on the authenticity of the evidence.

14. In the case of Ahmed Ali and another v. The State (Civil Appeal No.48 of 2021), the Hon'ble Supreme Court through a judgment dated 13.12.2022, has made following observations:

*“8. Another important provision is the Control of Narcotic Substances (Government Analysts) Rules, 2001, which provides the procedure to be followed by the police while dispatching the narcotic for the test or analysis and also the procedure to be adopted by the analyst. Relevant provisions therefrom are as follows:*

**4. Dispatch of sample for test or analysts, ---** (1) Reasonable quantity of samples from the narcotic drugs, psychotropic substances of the controlled substances seized, shall be drawn on the spot of recovery and dispatched to the officer-incharge of nearest Federal Narcotic Testing Laboratory, depending upon the availability for test facilities, either by insured post or through special messenger duly authorized for the purpose.

(2) Samples may be dispatched for analysis under the cover of a Test Memorandum specified in Form-1 at the earliest, but not later than seventy-two hours of the seizure. The envelope should be sealed and marked "Secret Drug Sample/Test Memorandum."

**5. Receipt in the laboratory and examination of sample with reference to Test Memorandum. ---** (1) The sealed envelope containing the samples, received in the laboratory should be carefully opened and given a distinct laboratory number.

(2) A separate register be maintained for narcotic drugs which may be further sub-divided agency-wise and the laboratory numbers should form a continuous series for each year.

(3) All samples shall be passed to the analyst the same day, who will then keep the same in his safe custody and will examine and record its, or their, weight in the Test Memorandum. He will compare the markings on the Test Memorandums with the markings on the packages envelopes and will ensure that he test the relevant sample, and in no case, the analysis of a narcotic drug be delayed as the Courts may refuse to extend remand beyond fifteen days in the absence of a chemical report.

**6. Report of result of test or analysis. ---** After test or analysis the result thereof together with full protocols of the test applied, shall be signed in quadruplicate and supplied forthwith to the sender as specified in Form-II.

*The above provisions make it clear that samples of reasonable quantity have to be drawn at the spot from the narcotic substances and the same have to be dispatched to the nearest Testing Laboratory. It is important to note that the samples have to be dispatched for analysis at the earliest, but not later than seventy-two hours of the seizure. .... "*

15. In the Ahmed case (*supra*), the Hon'ble Supreme Court also addressed the principle of the benefit of doubt, affirming that it is well-established that the benefit of doubt does not require multiple flaws in the prosecution's case or several circumstances creating uncertainty. Even a single, reasonable doubt in the prosecution's evidence is enough to entitle the accused to the benefit of doubt, and this is not a matter of grace but a right.

16. In the case of *Barkurdar v. The State and another* (2023 SCMR 1791), the Hon'ble Supreme Court reaffirmed the principle that the accused is entitled to the benefit of the doubt, even if there is only one uncertainty in the case, and it is not necessary for multiple doubts to exist. The Hon'ble Supreme Court emphasized that for a conviction to stand, the evidence must be unimpeachable, trustworthy and reliable. Any doubt arising in the prosecution's case must be resolved in favour of the accused, ensuring fairness and upholding the presumption of innocence. This reinforces the standard that the prosecution must prove its case beyond a reasonable doubt, and if it fails to do so, the accused must be acquitted.

17. In this case, the delay in submitting the property to the chemical examiner, along with inconsistencies in the records and testimonies, raises significant doubts about the integrity of the evidence. Given that the "benefit of the doubt" is a fundamental right of the accused, it must be afforded to the appellant in this instance. The issues regarding the safe custody and handling of the evidence further contribute to the uncertainty surrounding the case.

18. We, therefore, are of the opinion that the evidence against the appellant is insufficient and cannot serve as a solid foundation for his conviction. In light of the discrepancies mentioned above, and extending the benefit of the doubt to the appellant, this appeal was **allowed** by means of our short order dated 11.12.2024, whereby the conviction and sentence imposed on the appellant through the impugned judgment were **set aside**, and the appellant was **acquitted** of the charges and ordered to be released forthwith by the jail authorities, unless he is required in connection with any other custody matter, and these are the reasons of the same.

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