

HIGH COURT OF SINDH CIRCUIT COURT MIRPURKHAS

Criminal Appeal No.S-136 of 2024

Present

Mr. Justice Dr.Syed Fiaz ul Hasan Shah.

Appellants/ accused: 1. Sikander Ali S/o Sobho Rind.
 2. Jesso @ Jesaram S/o Ghansham Das Malhi.
 Through Mr. Rao Faisal Ali, Advocate,

Respondent: The State
 Through, Mr. Ghulam Abbas, D.P.G Sindh.

Date of hearing: 06.03.2025.

Date of Judgment: 13.03.2025.

J U D G M E N T

Dr. Syed Fiaz ul Hasan Shah, J: The Appellants Sikander Ali and Jesso @ Jesaram have filed present Criminal Appeal under section 410 of the Criminal Procedure Code, 1898, against the Judgment of conviction dated 19-04-2022 passed by the learned Sessions Judge, Umerkot in Sessions Case No. 316/ 2020 (Re: The State Vs. Sikander Ali & another) emanating out of FIR No.26/2020 under section 4, 5 & 8 of the Sindh Preparation Manufacturing, Storage, Sell & Use of Gutka Manpuri Act 2019, registered at PS: Shadipali. After framing of charge and recording of evidence, the appellants were convicted U/S 265-H(ii) Cr.P.C for the offence under section 8 of the Sindh Prohibition of Preparation, Manufacturing, Storage, Sell & Use of Gutka Manpuri Act 2019 and sentenced for R.I for 03 (Three) years each and to pay fine of Rs.200,000/- (Two Lacs) each. It was further sentenced that in case of default of fine, they shall suffer six month more

and so also benefit of Section 382-B Cr.P.C was also extended to the appellants/accused persons.

2. The brief facts of the prosecution case are that on 30.10.2020 at 2030 hour complainant SIP Rustam Ali, of P.S Shadipali lodged FIR No.26/2020 registered with P.S Shadipali and said complainant SIP Rustam Ali has stated that he alongwith his subordinate staff left P.S. Shadipali vide Entry No.12 at 1730 hour in official vehicle No.SPG-029, which was driving by PC Ali Nawaz for patrolling in the area. After patrolling at different places, they reached at Mithrao Wah sunji Mori situated Girhore-Mirpurkhas road, where they started checking, when at about 1900 hours, a Mazda truck came from Girhore road. They stopped the said truck and checked and found loaded with sacks contained JND Gutka. They found 40 sacks out of which 35 sacks, each sack contained 50 packets of JND Gutka, while five sacks, each sack contained 35 packets of JND Gutka, total 1925 packets of JND Gutka, each packet contained 110 sashays of Gutka, total 2,11,750 sashays, which are injurious to human lives. They arrested the accused Sikander, who on inquiry disclosed that Gutka and Mazada truck belongs to Jesso Malhi resident of Umerkot town and they both doing business of Gutka. Due to non-availability of private person, he appointed PC Pirago Mal and PC Muhammad Hussain as mashirs. They conducted personal search of accused Sikander and recovered one currency note of Rs. 1000/- and one Q-Mobile. The Complainant had separated 05 sashays and sealed it for chemical analysis, while remaining property sealed separately. Thereafter, they brought the accused and case property at P.S Shadipali, where complainant lodged the FIR on behalf of the state.

3. After completion of investigation, the Police Officials submitted challan of the case, before the concerned Magistrate. Later the Learned

Magistrate, after completing the legal formalities, has sent up case to the Sessions Court for trial. On receiving of R&P, the learned trial Court has supplied necessary documents to the accused at Exh.1 and 4. The charge had framed against Appellant/accused at Exh.5, to which they had pleaded not guilty and claimed to be tried vide their pleas at Exh 5-A & 5-B respectively.

4. At trial, the prosecution has examined PW-1 Complainant and seizing officer SIP Rustam Ali at Exh.6, he had produced departure and arrival entries, memo of arrest and recovery and FIR at Exh.6-A to 6-C. PW2 mashir PC Pirago Mal at Exh.07, he had also produced memo of inspection at Exh.7-A. PW-3 1.O/SIP Mansingh was examined at Exh.8, entry of Malkhana register, entries, letter of DHO, receipt and chemical examiner's report and criminal record of accused Jesso at Exh.8-A to 8-L respectively. Thereafter, the prosecution had closed its side vide statement at Exh.9.

5. The statements of accused under section 342 Cr.P.C, were recorded at Exh. 10 & 11. The appellants had denied the prosecution allegations and claimed to be innocent. The Appellant Sikander had stated that he was booked in this case at the instance of DSP Sher Khan Rind by the Kunri Police and brought at P.S Shadipali Pali. He had further stated that he did not disclose the name of Appellant No.2/accused Jesso and he was not previously known to him. The Appellant No.2/accused Jesso in his statement deposed that he is innocent, pray for justice, and said that he is engaged in confessionary business and brick kilns. However, the Appellant had neither examined themselves on oath nor produced any witness in their defence.

6. The Counsel for the Appellant argued that the Appellants are innocent and FIR was lodged at 2030 hours after one hour 30 minutes

seizing proceedings, which is not appealable to a prudent as huge case property more than 211750 packets of gutka have been counted/weighted and seized in such a short span of time and then within no time an FIR had also registered. He argued that there are material contradictions in the testimony of witnesses. He further argued that the case property in FIR, Challan, Evidence and elsewhere has claimed as JND Gutka while the report of Chemical laboratory reveals that the case property is Safina Indian Gutka. The Incharge Malkahana was not examined so also Road certificate has not produced. He also argued that there is violation of provision of section 103 Cr.P.C as alleged recovery was made on very busy road and neighborhood of Meghwar community. He further argued that the prosecution has failed to prove its case against the accused, therefore accused may be acquitted in the interest of justice and impugned Judgment may be set aside.

7. The Learned DPG appearing on behalf of the State has submitted that all the prosecution witnesses have supported the case in their evidence. He has further submitted that police officials are good witnesses as private witnesses. He has argued that Food Analysis report is in positive. He has urged that huge quantity of Gutka has been recovered from the possession of accused which cannot be foisted. He further urged that accused Jesso is involved in several cases of same nature. He has lastly contended that the prosecution has succeeded to establish its case beyond any shadow of doubt; therefore, accused may be convicted in the interest of justice.

8. I have observed that the testimony of the PW-1 Complainant-cum-Seizing Officer is congruent with the case property as mentioned in the Memorandum of Arrest & Recovery and Register No.XXIX. However,

there is obtrusive contradiction, mis-description and inaccuracy of the case property in the self-produced and self-relied upon document produced by the prosecution i.e. report of Chemical Laboratory and District Health Officer. I refer the situation and record step by step. Firstly, the testimony of the Complainant-cum-Seizing Officer PW-01 SIP Rustam Ali on the point of case property is re-produced:

***“They found white color sacks loaded in the Mazda vehicle. They suspected and checked the sacks and found JND Gutka in the sacks. On counting they found 40 sacks loaded in the Mazda, out of which they found 3 sacks contained 50 packets of JND Gutka, while 5 sacks, each contained 35 packets of JND Gutka. Total packets became 1925. Each packet contained 110 sashays total 2,11,750 sashays of JND Gutka.*”**

The PW-1 produced Exh.P-6/B which is Memorandum of Recovery & Arrest dated 30.10.2020 at 1900 hour described the case property as ***“JND Indian Gutka 05 Pati for Chemical”***. Similarly, the details of Case property are mentioned in Register No.XXI Exh.P-8/A ***“40 Packets, 35 white Kata containing 50/50 sashays and 05 Kata containing 35/35 Total 1925 Packets containing 110 sashays Total 211750 out of which 05 sashays for chemical examination sealed separately.”***

9. Conversely, the Exh.8/H is chemical report produced by the PW-03 Investigation Officer Mansingh. The description and accuracy of case property mentioned in the Exh.8/H is in glaring contradiction with Exh.6/B, 8/A and testimony. The Exh.8/H is a Letter dated 02.11.2020 written by District Health Officer, Umerkot addressed to the Incharge, Public Analysis Food Laboratory Sindh at Hyderabad which states ***“05 Packets of Indian Safina Gutka Pati”***. The next document is Exh.8/I letter dated 03.11.2020 written by PW-3 (SIP Mansingh) addressed to Incharge Food Analysis Lab, Hyderabad showing ***“05 Packets JND Indian”***. The next document is very crucial which is Report No.466/2020 dated 10.11.2020 Exh.8-J issued

by Government Public Analyst and addressed to the District Health Officer, Umerkot and it has not addressed to the Investigation Officer. It has clearly mentioned in the said report that it is being responded with reference number of District Health Officer. In other words, the Chemical report Exh.8-J has no reference of the letter dated 03.11.2020 Exh.8-I as claimed by prosecution. Therefore, I am constrained to form an opinion that the Government Public Analyst, Hyderabad has sent his report Exh.8/J in response to Exh.P/H letter dated 02.11.2020 written by DHO, Umerkot and the opinion of chemical laboratory is with regard to **“05 Packet of Indian Safina”** and the report is not with regard to **“05 packet JND Gutka”**. There is marginal difference in description of the case mentioned by the Investigation Officer and the report prepared by chemical laboratory. Notably, the mis-descriptions of case property and the inaccuracy in the Memorandum of Recovery and Chemical Examination report is fatal to the case of prosecution. A comprehensive inventory of the actual items recovered must eminently be given as the prosecution in Narcotics cases is always encircling around the Memorandum of Recovery and safe custody and safe transmission of case property. In present case, the Memorandum of Recovery & Arrest and the description of case property in chemical report are not free from variation and contradiction. The mis-descriptions, inaccuracy or any flaw in documenting or handling case property cannot casually be ignored and the Court cannot treat it minor contradiction as emphasized by the Hon’ble Supreme Court of Pakistan.¹

10. Moving on towards the test of safe custody and safe transmission of the case property in the present case. The PW-2 Piragomal is a mashir who deposed **“We did not open the packets, but make total of sashays on the number printed on the packet”** while the

¹ **“Qaiser and another v. The State” (2022 SCMR 1641)**

PW-3 Mansingh who is the Investigation Officer during his evidence on the point of safe custody and safe transmission of the case property he deposed ***“I deposited the case property in malkhana vide entry No.169 of Register-19, through WHC Muhammad Islam. I produce the same as Exh.8-A. On the same day I recorded statement of WHC Muhammad Islam.*** However, to prove the safe custody of the case property neither any Incharge Malkhana to whom the case property of 211750 packets of JND Gutka were entrusted has been produced by the prosecution nor the WHC Muhammad Islam has produced by the prosecution to prove that the safe custody of case property. Furthermore, the prosecution has also failed to demonstrate that the 05 packet sample of case property was safely transmitted to the Chemical Laboratory for analysis. In this regard the evidence of PW-03 / Investigation Officer is important. He deposed that ***“on 30.11.2020, I sent case property to chemical examiner Hyderabad through PC Ahmed Hussain of P.S Shadipali.”*** However, the prosecution has again failed to produce PC Ahmed Hussain in order to prove the safe transmission of case property and delivery to the office of District Health Officer, Umerkot or Government Public Analyst, Food Laboratory, Hyderabad without arrangements. The Prosecution has failed to produce the necessary Road Certificate a pre-condition for safe transmission of case property.

11. The prosecution has failed to demonstrate that the case property produced in Court JND Gutka which had sent to District Health Office by the Investigation Officer is the same as mentioned in the Letter dated 02.11.2020 by the District Health Officer and forwarded to the Chemical Analyst report as Indian Safina Gutka Pati. The prosecution is miserably failed to prove the case and it is act of uttering charges in derogation of the settled principles ruled down by the Hon'ble Supreme

Court of Pakistan ² that in absence of establishing the safe custody and safe transmission, the element of tempering cannot be excluded in this case. Any break in the chain of custody i.e. the safe custody or safe transmission of case property or samples, makes the report of chemical examiner worthless and un-reliable for justifying conviction of the accused.

12. The admission of the PW-03/ Investigation Officer (author) that ***“It is correct to say that Exh.8-A, is neither original nor carbon copy of Register-19”*** makes the Register No.XIX as inadmissible evidence although it has admitted by trial Court and read-over during evidence, but it stands in violation of Article 76 of the Qanun-e-Shahadat Order, 1984 too. The failure to produce valid entry of the Register No. XIX is not fulfilling the requirement of Police Rules, 1934. It is the duty of investigation and prosecution to enter the factum of handing over the case property as well as sealed sample parcels and other recovered articles from the possession of Appellant in the relevant registers as required under Section 44 of the Police Act, 1861 and Police Rules 22.48 and 22.70 of Police Rules, 1934.

13. Beside above infirmities, it is also unperceivable to a prudent mind that the memo of recovery was prepared on 30.10.2020 at 1900 hours, while the FIR was lodged on 30.10.2020 at 2030 hours and as per evidence of PW-01, time about one hour thirty minutes was consumed in arrest, search, recovery and seizure proceedings. If that is true, it is unbelievable that after recovery proceeding of one hour thirty minutes the FIR could be registered at 08:30 evaporating the distance of place of

² “Ikramullah v. The State” (2015 SCMR 1002); “The State vs. Imam Bakhsh” (2018 S’CMR 2039); “Abdul Ghani v. The State” (2019 SCMR 608); “Kamran Shah vs. The State” (2019 SCMR 1217); “Mst. Razia Sultana vs. The State” (2019 SCMR 1300); “Faizan Ali vs. The State” (2019 SCMR 1649); “Zahir Shah alias Shat vs. State through AG KPK” (2019 SCMR 2004); “Haji Nawaz vs. The State” (2020 SCMR 687); “Qaiser Khan vs. The State” (2021 SCMR 363); “Mst. Sakina Ramzan vs. The State” (2021 SCMR 451); “Zubair Khan vs. The State” (2021 SCMR 492); “Gulzar vs. The State” (2021 SCMR 380).”

incident and Police Station and the time period to return the police party from the place of incident, when the admitted distance is 7 to 8 Kilometers, as per story of prosecution.

14. There is no explanation or reason available on record for its failure to establish and follow accuracy in description, safe custody, its safe transmission. This led to me at a conclusion that the prosecution has shattered evidence and has failed to prove the case. It is settled law that where safe custody or safe transmission of the Narcotics is not substantiated or based on unpersuasive evidence, the Report of Government Analyst becomes doubtful and unreliable. The same concept is applicable in the present case having identical nature and fix the same mandate upon prosecution. The Prosecution cannot exonerate itself from the duty of well recognized doctrine of safe custody and safe transmission of case property which are being followed strictly even in relation to other then narcotics cases such as Gender base violence cases. The chain of events—series of things linked, connected or associated together, would have to demonstrate and prove by the prosecution and if any link is missing or division occur, the benefit would go in favor of the accused.³

15. Therefore, I cannot safely rely upon the evidence of prosecution being untrustworthy evidence having complexion of broken safe custody and safe transmission, inadmissible document and contradictions. I hold that impugned Judgment of Conviction based on unpersuasive evidence and the Appellant are entitled for benefit of doubt. The rule of benefit of doubt is essentially the rule of prudence which cannot be ignored while dispensing justice. The steadily commandment of **law** necessitate unremitting attention for conviction that it must be based on unimpeachable evidence and certainty of guilt and where any doubt emerges

³ “Javed Iqbal v. The State” (2023 SCMR 139); “Mst. Sakina Ramzan v. The State” (2021 SCMR 451) and , and “Qaiser Khan v. The State” (2021 SCMR 363).

would indispensably favor the Accused. The Hon'ble Supreme Court of Pakistan has ruled down in several cases that it does not need to be a plethora of circumstances raising doubt—a single event that creates reasonable doubt in the mind of a prudent person regarding an accused's guilt would entitle him acquittal as a matter of *right* and not as clemency or grace.⁴ It is trite law that single dent in the case of prosecution is sufficient for acquittal.⁵ Therefore, the impugned Judgement of Conviction dated 19.04.2022 passed by the learned Sessions Judge, Umerkot is set aside and the Appellants are acquitted.

JUDGE

Adnan Ashraf Nizaman

⁴ Tariq Pervez v. The State (1995 SCMR 1345), Riaz Masih alias Mithoo v. The State (1995 SCMR 1730), Muhammad Akram v. The State (2009 SCMR 230), and Hashim Qasim and another v. The State (2017 SCMR 986).

⁵ “Rehmatullah vs. The State” (2024 SCMR 1782); “Muhammad Mansha versus The State” (2018 SCMR 772), “Abdul Jabbar and another versus The State” (2019 SCMR 129), “Mst. Asia Bibi versus The State and others” Crl. Appeal No.40132/2023 8 (PLD 2019 SC 64) and “Amir Muhammad Khan versus The State” (2023 SCMR 566).