

Narcotics : No Safe Custody

175

**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT HYDERABAD**

Before:

Mr. Justice Mohammad Karim Khan Agha
Justice Mrs. Kausar Sultana Hussain

Cr. Appeal No.D- 325 of 2012

Mst. Shahjehan

Versus

The State

Appellant : Mst. Shahjehan W/o Ashique Ali (present on bail)	through Mr. Ishrat Ali Lohar alongwith Mr. Zulfiqar Ali Korai, Advocate
Respondent : The State	through Mr. Israr Hussain Chang, Special Prosecutor ANF
Date of hearing	01.02.2023
Date of judgment	09.02.2023

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.-This criminal appeal is directed against the judgment dated 22.10.2012, passed by the learned Ist. Additional Sessions Judge/Special Judge under Control of Narcotic Substances Act, Hyderabad, in Special Case No.70 of 2008, arising out of Crime No.04 of 2008, registered at Police Station ANF, under section 9(c) of Control of Narcotic Substances Act, 1997 (CNSA) whereby the appellant Mst. Shahjehan has been convicted u/s 9(c) CNSA and sentenced to suffer RI for 14 years and to pay the fine of Rs.50,000/-. In case of default in payment of fine she was ordered to suffer simple imprisonment for 06 months more (the impugned

judgment). Benefit of Section 382-B Cr.P.C. was also extended to the accused. As regard the case of co-accused Ashique Ali S/o Noorullah Mallah, Mashooque Ali S/o Noorullah Mallah and Zubair Ali S/o Noorullah Mallah, they have been acquitted of the charge by extending them the benefit of the doubt; whereas co-accused Mst. Farzana was absconder and her case was already bifurcated as mentioned in the impugned judgment.

2. Facts of the prosecution case as disclosed in the FIR are as under:-

"Complainant Muhammad Muzammil Ahmed Sub-Inspector / SHO of PS ANF Hyderabad lodged FIR alleging therein that on 28.06.2008 at 1530 hours he along with his subordinate staff Sobedar Abdullah, HC Sher Muhammad, PC Imtiaz Ali, LNK Rustam and others of ANF staff duly armed left Police Station in government vehicle driven by driver Ghulam Rasool after keeping Roznamcha Entry No.7 at 1430 hours for the purpose of patrolling. When they reached on Auto Bhan road at Fateh Chowk, they received spy information that Shah Jehan Bibi, Ashique Ali, Mashooque Ali, Zubair Ali R/o Shah Latif Town Site Area, Hyderabad are involved in the trade of Narcotics since long time and today at any time, Mst. Shahjehan will bring Narcotics at her house. On receipt of such information, they started surveillance at the road leading towards Shah Latif Town in front of Pakola Factory at 1500 hours and at 1530 hours complainant party saw a woman wearing black Burqa/Guan having blue colour shopping bag in her hand, going to Shah Latif Town and on identification of spy, she was stopped and passerby was asked to act as mashir but they refused and after citing HC Rahim Bux and HC Sher Muhammad were appointed as witnesses from raiding party, apprehended woman was enquired. On enquiry she disclosed her name as Shahjehan Bibi W/o Ashique Ali B/c Mallah R/o Shah Latif Town SITE Area Hyderabad. Thereafter complainant party took the custody of said shopping bag from her hand, checked it and found 06 foil packs "Kafee Marka" packet wrapped with newspaper, which was opened and found Charas in the shape of 06 slabs wrapped in red colour plastic and each

packet was weighed separately which becomes one kilogram of each packet total 06 kilograms out of packets, 10/10 grams Charas was separated for chemical examination and sealed in Khakhi envelop and marked serial numbers 01 to 06 and remaining was also sealed with shopping bag in separate white cloth bag. On personal search of lady, she produced Rs.120/- and she was arrested and such memo of arrest and recovery was prepared and its contents were read over to mashirs, who after admitting the same, put their signatures. During interrogation, she disclosed that she purchases the Charas from Farzana W/o Budhal R/o near Abdullah Centre Qasimabad, Hyderabad and said Farzana has more Charas. As arrested accused Shahjehan Bibi and co-accused Mst. Farzana, Ashique Ali, Mashooque Ali, Zubair Ali committed the offence punishable U/s 9-C CNS Act, hence, complainant came at Police Station along with accused and recovered case property and lodged present FIR."

3. During investigation, Investigating Officer recorded 161 Cr.P.C. statements of the PWs. Samples of the substance / charas were sent to the chemical examiner and positive chemical report was received. On the conclusion of investigation challan was submitted against the aforementioned accused for offence u/s 9(c) of CNSA.
4. Trial court framed charge against accused at Ex.2 u/s 9(c) of CNSA, to which, they pleaded not guilty and claimed to be tried vide their pleas at Ex.2/A to 2/E.
5. At the trial prosecution examined 02 PWs and produced numerous documents and items; thereafter, prosecution was closed vide statement of the learned S.P.P for ANF at Ex.7.
6. Statements of accused were recorded u/s 342 Cr.P.C. at Exh.8 to 11, wherein they denied the prosecution allegations leveled against them and claimed their false implication in this case. Accused/appellant Mst. Shahjehan in order to substantiate her plea had produced FIR bearing Crime No.397/2009, application dated 11.11.2009 and another FIR No.34 of 2011; however, none of the

accused in order to disprove the prosecution allegation has examined him/herself on oath or any D.W.

7. Learned trial Judge after hearing the learned counsel for the respective parties and evaluating the evidence available on record convicted and sentenced the appellant as set out earlier in this judgment.

8. Learned trial court in the impugned judgment has already mentioned/discussed the evidence in detail and there is no need to repeat the same here, so as to avoid duplication and unnecessary repetition.

9. Learned counsel for the appellant has contended that the prosecution case is highly doubtful; that it is lacking in material particulars and same is full of contradictions, inconsistencies and same have caused a serious dent in the prosecution case; that there was no independent mashir associated with the arrest and recovery which is contrary to S.103 Cr.PC; that nothing was recovered from the appellant and alleged recovery has been foisted upon her and even other wise safe custody of the allegedly recovered narcotic has not been proved which renders the chemical report unreliable and as such for any or all of the above reasons the appellant be acquitted by being extended the benefit of the doubt. In support of his contentions, learned counsel for the appellant placed reliance on the cases of **Zahir Shah alias Shat V The State through Advocate-General, Khyber Pakhtunkhwa** (2019 SCMR 2004), **Qaiser Khan V The State through Advocate-General, Khyber Pakhtunkhwa** (2021 SCMR 363), **Ikramullah and others V The State** (2015 SCMR 1002), **Mst. Razia Sultana V The State and another** (2019 SCMR 1300) and **Anti-Narcotics Force Regional Directorate Sindh through Deputy Director (Law) V Farhad Khan** (2020 YLR 1453).

10. Learned Special Prosecutor ANF has fully supported the impugned judgment and contended that the prosecution had fully proved its case against the appellant beyond a reasonable doubt and that the appeal be dismissed being without merit.

11. We have carefully considered the arguments of the learned counsel for the parties, scanned the entire evidence and reviewed the relevant case law including that cited at the bar.

12. At the very outset it is noted that in narcotic cases one of the **most crucial** aspects of the case is that the prosecution must prove safe custody of the narcotic from the time of its recovery until the time when it is sent for chemical examination. If they fail to do so then there is a possibility that the narcotic substance had been tampered with before it was received at the chemical laboratory for its examination. In such like cases where unbroken chain of custody cannot be proved by the prosecution then the chemical report is unreliable and of no legal value. It is noted that this is the view taken by the Supreme Court **regardless** of the amount of the recovered narcotic whether small or large as the principle remains the same. In this case the appellant was arrested by the police on 28.06.2008 when narcotics weighing 6Kgs were recovered from her possession. Those narcotics according to the evidence of the complainant were taken to the PS and were kept in the Malkhana for safe keeping which is corroborated by PW 2 Sher Muhammed. According to the prosecution case 2 days later PC Basit Mehmood took the recovered narcotic to the chemical examiner on 30.06.2008. However neither was the malkhana in charge examined to prove that the narcotics had indeed been deposited in the malkhana after their recovery nor was any malkhana entry exhibited to show that the recovered narcotics had ever been kept in the malkhana and thus it cannot be said with certainty where the narcotics were actually kept for the two day period before they were taken to the chemical examiner on 30.06.2008 as there has been a break in the chain of custody of the narcotics and as such it cannot be ruled out that the narcotics were not tampered with during this two day period. Even PC Basit Mehmood who allegedly took the recovered narcotics from the PS to the Chemical examiner after this two day delay was not called to give evidence and as such safe custody from the PS to the chemical examiner has also not been proven. Thus, based on the particular facts and circumstances of this case we find that the prosecution has **not** been able to prove safe custody of the narcotics from the time when they were recovered from

the appellant till the time when the same was sent for chemical examination as it appears that the narcotics were not accounted for for 2 days and there is even no evidence as to who actually took the recovered narcotics from the PS to the chemical examiner after this two day period during which time the narcotics could have been tampered with which renders the chemical report unreliable and of no legal value to the prosecution in proving the recovered narcotics.

13. With regard to the importance of the prosecution proving safe custody of the narcotic from the time of its recovery to the time it was sent for chemical analysis the same was stressed/emphasized by the Supreme Court in the case of **Qaisar V State** ((2021 SCMR 363) which held as under;

*"3. We have heard the learned counsel for the petitioner as well as the learned Additional Advocate General, KPK and perused the available record alongwith the impugned judgment with their assistance and observed that in this case the prosecution has failed to establish the safe custody and safe transmission of sample parcels to the concerned laboratory. This court had laid down in many judgments that the representative samples of the alleged drug must be kept in safe custody and undergo safe transmission from the stage of recovery till its submission to the office of the Government analyst. **Non establishing the said facts would caste doubt and would impair and vitiate the conclusiveness and reliability of the report of the Government analyst. Thus rendering it incapable of sustaining conviction.***

*4. In the present case no police official was produced before the Trial Court to report about safe custody of samples if entrusted to him for being kept in the Malkhana in safe custody. Even the police official whose belt number (FC 4225) has been mentioned by the Government analyst in his report, was not produced by the prosecution to depose regarding the safe deposit of the said sample parcels in the concerned laboratory. The record reveals that the recovery was allegedly affected on 19.08.2011 whereas, according to the report of chemical examiner, the sample parcels were received in the said office on 26.08.2011. **Nobody from the prosecution side was produced to claim that during this period the said sample parcels remained intact in his possession or under his control in the Malkhana in safe***

custody. Even the prosecution is silent as to where remained these sample parcels from 19.08.2011 to 26.08.2011. **In absence of establishing the safe custody and safe transmission, the element of tampering cannot be excluded in this case.** 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 Substance (Government Analysts) Rule 2001 (Rules 2001), rest 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 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 the three members benches of this court i.e. **Ikramullah v. the State** (2015 SCMR 1002), **the State v. Imran Bakhsh** (2018 SCMR 2039), **Abdul Ghani v. the state** (2019 SCMR 608), **Kamran Shah vs. 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 thr. AG KPK** (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)."(bold added)

14. Thus for the reasons mentioned above we find that the prosecution has failed to prove safe custody of the narcotic from the time when it was recovered from the appellant until the time it was sent for chemical analysis and as such the possibility of the narcotic being tampered with during this period cannot be ruled out. Thus, we find that the prosecution has **not** proved its case beyond a reasonable

doubt against the appellant and hence by being extended the benefit of the doubt the appellant is acquitted of the charge, the impugned judgment is set aside and the appeal is allowed. The appellant's bail bonds are cancelled and she is free to go.

15. The appeal stands disposed of in the above terms.