

Narcotics - Acquitted - No Sdc
Custody - Pairs Case

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IN THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha

Mr. Justice Zulfiqar Ali Sangi

CRIMINAL APPEAL NO.550 OF 2021

Appellants:

1) Liaquat Khan son of Daraz Khan
2) Muhammad Nisar son of
Muhammad Noor Hassan
through Mr. Inamullah Khan,
Advocate.

Respondent:

The State through Mr. Muhammad
Iqbal Awan, Addl. Prosecutor
General Sindh.

Date of Judgment:

13.09.2022

JUDGMENT

Mohammad Karim Khan Agha, J:- Appellants Liaquat Khan and Muhammad Nisar were tried in the Model Criminal Trial Court / Court of VTH Additional Sessions Judge (East) under Crime No.417/2020 u/s 6/9-C CNS Act, 1997 registered at PS Zaman Town, Karachi and vide judgment dated 16.09.2021 both accused persons were convicted and sentenced to suffer R.I. for 14 years each and pay fine of Rs.1-Million each and in default of payment of fine both were to suffer S.I. for 05 months more. Both the accused were also given the benefit of Section 382-B Cr.P.C. and all the sentences were ordered to run concurrently.

2. The brief facts of the prosecution case are that on 17.06.2020 the complainant ASI Manzoor Hussain during patrolling in the area received spy information that two drug peddlers are transporting contraband/ charas in one corolla car of white color and were going from Korangi Coast Guard Chowrangi towards Chakra Goth riding in the said car, hence on such information the complainant alongwith his subordinate staff reached at road opposite Chakra Goth near graveyard, Korangi No.1

and during snap checking stopped one white color corolla car bearing registration No.LWQ-2600 at about 0445 hours, coming from coast guard chowrangi in which two persons were sitting, on query the person who was sitting on the drivers seat disclosed his name as Liaquat son of Daraz Khan and the person, who was sitting next to driver seat disclosed his name as Muhammad Nisar son of Muhammad Noor Hassan. The complainant conducted the search of said car in presence of mashirs and recovered 9-packets of charas wrapped with yellow color tape from beneath the backside seat of said car. The complainant then weighted the said recovered charas through digital scale and found 10 kilograms weight of the said charas. From personal search of accused Liaquat one Nokia Keypad mobile phone, cash Rs.1500/- and color copy of CNIC of accused Liaquat were also recovered, whereas from the personal search of accused Muhammad Nisar one VIGOTEL keypad mobile phone, cash Rs.1000/- and original CNIC of accused were recovered. Thereafter the complainant sealed the case property viz. charas on the spot and arrested accused persons under the mashirnama of arrest and recovery. He also took the car bearing registration No.LWQ-2600, into police custody being case property and then brought arrested accused along with recovered case properties at PS where he lodged the FIR u/s. 6/9-C CNS Act against both the accused.

3. After completion of investigation the challan was submitted against both the accused to which they pleaded not guilty and claimed trial.

4. The prosecution in order to prove its case examined 05 Prosecution Witnesses and exhibited various documents and other items. The statements of accused were recorded under Section 342 Cr.P.C in which they denied the allegations leveled against them and claimed false implication by the police as they had been picked up prior to their being shown arrested in this case and had been fixed in this case as they had refused to pay a bribe to the police. Neither of the appellants gave evidence on oath, however, one DW was called to show that one of the appellants Liaquat had been taken away by the police prior his arrest in this case.

5. After hearing the parties and appreciating the evidence on record, the trial court convicted the appellants and sentenced them as set out earlier in this judgment; hence, the appellants have filed this appeal against their convictions.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 16.09.2021 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel for the appellants argued that there were contradictions in the evidence of the prosecution witnesses and as such that evidence could not be safely relied upon and regarding; he also stressed that no safe recovery has been made of the narcotic substance at the time of the arrest of the appellants to the time when the recovered substance was sent for analysis which meant that the chemical report was of no value to the prosecution and as such the appellants should be acquitted of the charge by being extended the benefit of the doubt.

8. Learned Additional Prosecutor General Sindh has fully supported the impugned judgment and has submitted that the appeals are without merit and should be dismissed.

9. We have heard the arguments of the learned counsel for the appellants and learned Additional Prosecutor General Sindh and have also gone through the entire evidence which has been read out by the learned counsel for the appellants and the impugned judgment with their able assistance.

10. In narcotic cases, one of the important crucial aspects 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 of no value. In this case the appellants were arrested by the police on 17.06.2020 when narcotics weighing 10-kg were recovered from a car which the appellants

were driving. Those narcotics initially remained with the complainant until such time as he handed them over to I.O. of the case. The complainant kept the narcotics in his custody for a number of hours because the I.O. was said to be busy in another case. The complainant ought to have immediately deposited the narcotic substance which he had sealed on the spot in the Malkhana. In any event he handed the narcotic which he had recovered from the appellants to the I.O. Ali Akbar, PW-3, who then according to his evidence placed the narcotic in the Malkhana for safe keeping. However, the narcotic remained in the Malkhana for more than one day. It has come in evidence that during this period the custodian of the Malkhana Abdul Ghafoor was not examined to prove that the narcotic had been kept in safe custody in the Malkhana prior to sending it for chemical examination. It was admitted in the evidence that the Malkhana Entry No.66 whereby the narcotics were placed in the malkhana was also not produced/exhibited and as such we cannot be certain that safe custody of the narcotic was maintained from the time it was recovered till the time of its examination as it might have been tampered with. If the prosecution had called the custodian of Malkhana Abdul Ghafoor to give evidence and exhibited the Malkhana Entry No.66 the situation might had been different. However, based on particular facts and circumstances of this case we find that the prosecution has not been able to prove safe custody of the narcotic from the time when it was recovered from the appellants till the time when the same was sent for chemical examination and as such the chemical report is of no value to the prosecution in proving the recovered narcotic.

11. 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 recent case of **Qaisar V State** (Jail Appeal 587 of 2016) dated 02.06.2022 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 cast 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 effected 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)."

12. 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 until the time it was sent for chemical analysis and as such we find that the prosecution has not proved its case beyond a reasonable

doubt against the appellants and hence by being extended the benefit of the doubt the appellants namely Liaquat Khan son of Daraz Khan and Muhammad Nisar son of Muhammad Noor Hassan are hereby acquitted of the charge. The appellants shall be released forthwith unless they are wanted in any other custody case.

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


JUDGE
13/09/2022


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