

Acquitted: No Safe Custody

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IN THE HIGH COURT OF SINDH, KARACHI

Present:

*Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Arshad Hussain Khan,*

Criminal Appeal No.323 of 2022.

Appellant: Sher Muhammad Khan S/o. Qayyum
through Mr. Rafeo Fazal, Advocate
along with Mr. Zohaib Dal, Advocate.

Respondent: The State through Mr. Muhammad
Iqbal Awan, Additional Prosecutor
General Sindh.

Date of Hearing: 15.12.2022.

Date of Announcement: 20.12.2022.

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellant PC Sher Muhammad Khan S/o. Qayyum has preferred this appeal against the judgment dated 20.04.2022 passed by the VIIIth Additional District & Sessions Judge/ Additional Model Criminal Trial Court, Karachi (West) in Sessions Case No.50 of 2021 arising out of Crime No.400 of 2020 U/s. 6/9(c) of Control of Narcotic Substance Act, 1997 registered at P.S. Jackson, Karachi whereby the appellant was convicted and sentenced to undergo R.I. for 07 years and 06 months along with fine of Rs.55,000/-. In failure to pay the fine he was ordered to undergo S.I. for six months more. The benefit of section 382-B Cr.P.C. was also extended to the appellant.

2. The brief facts of the prosecution case are that on 30.10.2020 the complainant SIP Maqsood Alam of PS Jackson interrogated the accused PC Sher Muhammad Khan son of Qayyum buckle No.42874 vide entry No.55-0130 hours who disclosed that he along with PC Asif Ali, PC Fayaz Khan, PC Nzish Awan and PC Munsif Ali apprehended the accused Mehboob Ali Jaffery son of Ghulam Abbas and his son Mohsin from Baba House on 27.10.2020 at about 5/6 pm and recovered 34 packets of charas. After recovery of 34 packets of charas they released the accused Mehboob Ali Jaffery and his son Mohsin and he distributed 34 packets of charas amongst them. He received 07 packets as his share which he kept the same in his house. On this he took the accused into

proper custody and proceeded towards the house of accused bearing House No.L-369, Shireen Jinnah Colony No.1, Keamari, Karachi and reached there at 0200 hours. The accused PC Sher Muhammad Khan voluntarily led the police party in his house and took out 07 packets of charas wrapped with yellow color tape from a box lying in a white color cloth bag. The word "A" was written on each packet. The weight of charas was 08 kilo 300 grams (8300 grams). Then he prepared the memo of arrest and recovery on the spot and sealed the case property and brought the accused and recovered case property at Police Station where he lodged the FIR against the accused persons.

3. After completion of investigation I.O. submitted charge sheet against the arrested appellants to which they both plead not guilty and claimed trial.

4. The prosecution in order to prove its case examined 04 witnesses and exhibited various documents and other items. The appellants in their S.342 Cr.PC statements claimed false implication however they did not examine themselves on Oath or call any DW in support of their defence case.

5. After appreciating the evidence on record the trial court convicted the appellant and sentenced him as set out earlier in this judgment hence, the appellant has filed this appeal against his conviction. The co-accused Mr.Mehboob Ali Jafferri however was acquitted of the charge since no recovery was made from him.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 20.04.2022 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 appellant has contended that the appellant is completely innocent and has been falsely implicated in this case; that no narcotics were recovered from him and that the same were foisted on him; that he did not take the police to his house where any narcotics were recovered; that there are material contradictions in the evidence of the witnesses which renders their evidence unreliable; that S.103 Cr.PC was violated as there was no independent mashir; that the prosecution had failed to prove safe custody and safe transmission of the narcotic from the time it was recovered from him until the time it was taken to the chemical examiner and as such the chemical report is of no legal value and for any or all of the above reasons he be acquitted of the charge by being extended the benefit of the doubt. In support of his contentions

he has placed reliance on the cases of **The State through Regional Director ANF v. Inam Bakhsh and others** (2018 SCMR 2039), **Qaiser and another v. The State** (2022 SCMR 1641), **Akhtar Gul v. The State** (2022 SCMR 1627), **Jawad Ali and another v. The State** (2022 P Cr.LJ 1779), **Khalid Mehmood and others v. The State** (2011 SCMR 664) and **Muhammad Akram v. The State** (2009 SCMR 230).

8. On the other hand learned Additional Prosecutor General Sindh appearing on behalf of the State has fully supported the impugned judgment and contended that the prosecution had proved its case beyond a reasonable doubt based on the evidence on record and as such the appeal being without merit be dismissed.

9. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence and considered the relevant law including the case law cited at the bar.

10. At the very outset we note 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 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 30.10.2020 where on his pointation narcotics weighing 8-kgs were recovered from his house by the police. Those narcotics according to the evidence of the complainant were taken to the PS where they were handed over to the head Mohrar. PW 2 Syed Ali who is the mashir of the memo of recovery is of no assistance in this regard as in his evidence he does not mention where the narcotics were kept or who they were given to on their return to the PS. PW 4 Mukhtiar Ahmed who was the IO of the case who deposited the narcotics in the chemical laboratory for testing on 02.11.2020 states in his evidence as under;

"I received case property from SIP Maqsood Alam on 30.10.2020 at 1630 hours. I kept the same at makhana of PS. I have not made any entry in the roznamcha regarding taking the case property from maal khan incharge and depositing the same to office of chemical examiner twice. I do not remember the

name of maal khana incharge of PS. It is correct to suggest that I have not recorded his statement nor he is witness in this case. It is incorrect to suggest that case property was with me after taking the same from SIP Maqsood Alam and depositing the same in the office of chemical examiner. It is correct to suggest that I have not produced the entry of register No.19 before this court. (bold added)

11. Thus, he has admitted that he did not examine the in charge of the malkhana as a witness in order prove safe custody and nor did he exhibit any malkhana entry to prove that the narcotics were kept in the malkhana for this two day period before being delivered to the chemical examiner and may have even remained with him. Thus, there is no evidence that the complainant placed the recovered narcotic immediately in the malkhana, that it was actually put in the malkhana as neither the malkhana in charge was examined nor any entry was exhibited which even showed that the property had been kept at all in the malkhana. 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 narcotic from the time when it was recovered from the appellant till the time when the same was sent for chemical examination as it appears that the narcotic was unaccounted for for two days during which time it could have been tampered with and as such we find the chemical report to be of no legal value to the prosecution in proving the recovered narcotic.

12. 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 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)."

13. 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 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 shall be released forthwith unless he is wanted in any other custody case.

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