IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Criminal Appeal No.D-147 of 2022
Criminal Appeal No.D-03 of 2023

PRESENT:
Mr. Justice Mehmood A. Khan
Mr. Justice Abdul Hamid Bhurgri

Appellant:	Muhammad Sadique son of Abdul Qadir Mengal, through Mr. Muhammad Saleem Laghari, Advocate.
Appellant:	Misri Khan son of Ghulam Rasool Chakrani, through Mr. Mian Taj Muhammad Keerio, Advocate.
The State:	Through Mr. Shawak Rathore, Deputy Prosecutor General.

Date of Hearing: **04.02.2025.**
Date of Judgment: **18.02.2025.**

J U D G M E N T

Abdul Hamid Bhurgri, J.- By this consolidated judgment, both criminal appeals stemming from the common judgment dated 03.12.2022 are addressed. These appeals pertain to Crime No.87 of 2021, registered at Police Station Matiari, concerning charges under Section 9(c) of the Control of Narcotic Substances Act, 1997. The appellants were convicted and sentenced to life imprisonment, accompanied by a fine of Rs.200,000/- each. In case of default, an additional six months of Simple Imprisonment was prescribed. However, the appellants were accorded the benefit of Section 382-B of the Code of Criminal Procedure. These appeals challenge the aforementioned judgment.

2. According to the facts outlined in the FIR, on 12.11.2021, SIP Sikandar Ali of Police Station Matiari, along with his subordinate staff, was conducting patrol duties at approximately 1930 hours in an official vehicle. Upon reaching Nasarpur Chowk near Bagri Graveyard, the police

initiated random inspection of vehicles. During this process, a Hino Mini Truck bearing registration No.LCA-341, traveling from Hyderabad, was intercepted. The truck was occupied by one individual in the driver's seat and two others seated beside him. Observing the police, one individual fled towards the eastern side of the road, while the remaining two were apprehended. Upon interrogation, the driver identified himself as Muhammad Sadique, son of Abdul Qadir Mengal, and the other apprehended person disclosed his name as Misri Khan, son of Ghulam Rasool Chakrani. Both individuals further revealed the identity of an absconding accomplice as Muhammad Suleman, son of Talib Chakrani. A search of the vehicle uncovered a plastic bag near the driver's seat, containing 20 packets of opium, weighing a total of 36 kilograms. The recovered contraband was promptly sealed for chemical analysis. During questioning, the accused confessed that the opium was intended for sale, but they failed to produce any documentation for the vehicle. The arrest and seizure were documented on site in the presence of witnesses, namely ASI Abdul Hakeem and PC Imam Bux. The accused, along with the seized property, were subsequently taken to the Police Station, where a formal FIR was lodged.

3. After completing the investigation, the Investigating Officer submitted the challan to the competent court. The case was then transferred to the learned Trial Court, where charges were framed after complying of Section 265-C of the Code of Criminal Procedure. The accused pleaded 'not guilty' and opted for trial.

4. To substantiate its case, the prosecution presented following witnesses:

i. PW-1 SIP Sikander Ali/complainant as well as I.O of the case (Exh.3) who produced roznamcha entries including departure, arrival and malkhana, mashirnama of arrest/recovery, letter addressed to chemical examiner, FIR and report of chemical examiner (Exh.3/A to 3/h).

ii. PW-2 mashir namely ASI Abdul Hakeem as PW-2 (Exh.4).

5. After examining above witnesses, the learned State counsel closed the side of prosecution vide statement Exh.5.

6. The accused, in their statements under Section 342 of the Code of Criminal Procedure, categorically denied the allegations and proclaimed their innocence, alleging false implication. However, they neither examined themselves under oath as permitted by Section 340(2) of the Code of Criminal Procedure nor lead any defence evidence.

7. The trial court after hearing the learned counsel for the parties and evaluating the evidence, vide Judgment dated 03.12.2022 convicted and sentenced Appellants/accused, as stated above. Hence, present appeals.

8. Learned Counsels for the appellants have advanced following submissions:-

i. The appellants assert their innocence, contending that they have been falsely implicated in the matter in hand.

ii. That the complainant and the Investigating Officer (I.O) is one and same, which introduces a conflict of interest.

iii. The ownership of the vehicle allegedly used in the recovery was not verified or proved by prosecution.

iv. The official in-charge of the safe custody of the purported sample parcels was conspicuously absent from the witness stand.

v. That the samples were sent for chemical examination after an inexplicable and undue delay spanning several days, further eroding the prosecution’s credibility.

vi. That admittedly recovery was made at National Highway which is a busy road but no private witness was cited. In conclusion, the counsels for appellants fervently pray for their acquittal.

9. Learned Deputy Prosecutor General (DPG) in support of the Judgment raised following contentions:-

i. The name of the accused/appellants is explicitly mentioned in the First Information Report (FIR), along with their alleged role in the offence.

ii. The substantial quantity of opium was recovered from the possession of the appellants/accused, underscoring the gravity of the offence.

iii. That the prosecution has successfully established the case against the accused by presenting cogent and credible evidence.

iv. Consequently, the learned DPG prays for the dismissal of the appeals and the affirmation of the trial court's Judgment of conviction.

10. We have heard learned Counsels for both the parties and scanned the entire evidence on record and perused the impugned Judgment.

11. It is trite law in Criminal jurisprudence that the prosecution has to prove the case against accused without any reasonable doubt. In cases under Control of Narcotic Substances Act, 1997, the prosecution is required to meticulously establish each step in process, starting from the recovery of the narcotic substance to the preparation of sample parcels, ensuring their safe custody, and secure transmission to the relevant laboratory. This procedural chain must be proven beyond any doubt by the prosecution. If, any link in the chain is missing, the benefit of the doubt is to be extended to the accused. It is the prosecution's responsibility to substantiate every aspect of its case, which includes presenting witnesses who kept the custody and one who is responsible for transmitting the samples to the office of the chemical examiner. Any failure in this process can undermine the entire case of the prosecution. The recovery purportedly took place on 12.01.2021, yet the sample was forwarded for chemical analysis on 19.01.2021 reflecting unexplained delay of seven days. Despite the criticality of establishing an unbroken chain of custody, the prosecution neither provided any justification of this delay nor examined the *Malkhana* Incharge to corroborate the safe keeping of the sample. As per Rule 4(2) of the Control of Narcotic Substances Act, such lapses and delays erode the reliability of the case and significantly weaken the prosecution position, casting serious doubts in its overall integrity. As per prosecution case PW-1 Sikander Ali, stated to have deposited case property in *Malkhana* so also Chemical lab, during his cross-examination stated "*that the case property was sent to chemical examiner after about seven days; voluntarily says; it took time to get permission from higher ups*". This delay was fatal to the case of

prosecution as the Hon'ble Supreme Court in the case of *Akhtar Gul v. The State* reported in **2022 SCMR 1627**, observed as under:-

> *"3. We have heard the learned counsel for the petitioner, learned counsel for the State, perused the record and observed that the recovery was effected on 16.10.2011, whereas according to the report of Forensic Science Laboratory (FSL), the sample parcels were received there on 21.10.2011 through FC 3087. Neither the Moharrar who kept the sample parcel in the Malkhana from 16.10.2011 to 21.10.2011 nor the constable FC 3078 was produced by the prosecution to establish the safe custody and safe transmission of the sample parcels to the concerned laboratory. So safe custody and safe transmission has not been proved by the prosecution."*

In another case of *Qaiser v. The State* **(2022 SCMR 1641)**, the Hon'ble Supreme Court had held as under:-

> *"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 or 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....."*

Similar view was taken by the Honourable Supreme Court in the case of *Muhammad Hazir v. The State* **(2023 SCMR 986),** with following observations:-

> *"3. After hearing the learned counsel for the appellant as well as the learned state counsel and perusing the available record along with the impugned judgment with their assistance, it has been observed by us that neither the safe custody nor the safe transmission of the sealed sample parcels to the concerned Forensic Science Laboratory was established by the prosecution because neither the Moharrar nor the Constable Shah Said (FC-2391) who deposited the sample parcels in the concerned laboratory was produced. It is also a circumstance that recovery was affected on 10.02.2015 whereas the sample parcels were received in the said laboratory on 13.02.2015 and*

> *prosecution is silent as to where remained these sample parcels during this period, meaning thereby that the element of tampering with is quite apparent in this case. This Court in the cases of Qaiser Khan v. The State through Advocate-General, Khyber Pakhtunkhwa, Peshawar (2021 SCMR 363), Mst. Razia Sultana v. The State and another (2019 SCMR 1300), The State through Regional Director ANF v. Imam Bakhsh and others (2018 SCMR 2039), Ekramullah and others v. The State (2015 SCMR 1002) and Amjad Ali v. The State (2012 SCMR 577) has held that in a case containing the above mentioned defect on the part of the prosecution it cannot be held with any degree of certainty that the prosecution had succeeded in establishing its case against an accused person beyond any reasonable doubt."*

Regarding the delay in sending samples the Hon'ble Supreme Court in the case of *Asif Ali v. The State* reported in **2024 SCMR 1408**, observed as under:-

> *"8. In the instant case, statements of PW-3 (Khurram Shehzad H.C.) and PW-4 (Tasawar Hussain S.I./Investigating Officer) reveal that the seven sample parcels of the charas allegedly recovered on 27.05.2021 were handed over to Ahsan Shehzad S.I. for transmission to office of the lab on 31.05.2021 i.e. much beyond seventy two hours of the seizure/in violation of rule 4(2) of the Rules of 2001 for which no plausible explanation has been offered by the prosecution."*

12. It was incumbent upon the prosecution to examine *Malkhana* incharge in order prove safe custody particularly when there was unexplained delay in sending samples to chemical examiner withholding such crucial evidence infer adverse presumption under article 129(g) of Qanoon-e-Shahadat Order,1984, which reads as under:-

> *"that evidence which could be and is not produced would, produced be unfavourable to the person who withholds it"*

13. Non-production of such important witness infers two possibilities, that if that witness had been produced he would have not supported the case of prosecution and or no such witness is in existence.

14. On the point of non-examination of material witness and delay in sending parcels to chemical examiner, the Honourable Supreme Court, in *Lal Jan v. The State* **(2023 SCMR 1009)** has held as under:-

> *"3. We have heard the learned counsel for both sides and without touching the merits of the case, at the very outset, observed that the recovery was effected on 03.07.2015*

> *whereas the sample parcels were received in the office of Forensic Science Laboratory, Khyber Pakhtunkhwa on 15.07.2015 through Arshad Haroon, Constable-32, but the said constable was never produced by the prosecution to establish the safe transmission of the sample parcels to the concerned laboratory story and there is no explanation as to why his evidence was withheld."*

Furthermore in the case of *Said Wazir v. The State*, reported in **2023 SCMR 1144**, the Hon'ble Supreme Court held as under:-

> *"3. Heard and perused the record. It has been observed by us that recovery was effected on 09.06.2016 whereas sample parcels were received in the office of chemical examiner on 13.06.2016 without any plausible explanation as to where remain these sample parcels from 09.06.2016 to 13.06.2016. The safe custody and safe transmission of the sealed sample parcels has also not been established by the prosecution as Moharrar, who kept the sample parcel in the Malkhana and the concerned Constable (FC No. 1374), who delivered the sample parcel to the office of Forensic Science Laboratory, were not produced by the prosecution. Even the prosecution failed to prove the ownership of the vehicle. This court in the cases of Qaiser Khan v. The State through Advocate General, Khyber Pakhtunkhwa, Peshawar (2021 SCMR 363), Mst. Razia Sultana v. The State and another (2019 SCMR 1300), The State through Regional Director ANF v. Imam Bakhsh and others (2018 SCMR 2039), Ikramullah and others v. The State (2015 SCMR 1002) and Amjad Ali v. The State (2012 SCMR 577) has held that in a case containing the above mentioned defect on the part of the prosecution, it cannot be held with any degree of certainty that the prosecution had succeeded in establishing its case against an accused person beyond any reasonable doubt."*

15. The prosecution has produced the entry No.53 of register No.19 to establish that the case property was deposited in *Malkhana* on 12.01.2021. We have carefully perused such entry which is available at page 25 of the paper book of the appeal, the entry is so blur and illegible, we also perused the entry available in R&Ps which was also illegible; on our specific query from learned DPG, whether original entry was produced before trial Court, he had no reply to that; we have also gone through the deposition of PW Sikander Ali, it is also not written by the trial judge if original seen and returned. This entry can by no stretch of imagination be said to be sufficient to prove safe custody of the case property.

16. Further, the prosecution has failed to verify regarding ownership of vehicle purportedly involved in the recovery.

17. Review of the judgment assailed reflects that essential aspects of the case have slipped from the sight of the learned trial judge, which are sufficient to create doubt in the prosecution's case. It is settled preposition of law even a single circumstance creates reasonable doubt in a prudent mind, the benefit must be given to the accused (who is favourite child of law). This benefit is given not as a grace or concession but as a matter of right. In the case of *Muhammad Mansha v. The State* **(2018 SCMR, 772)**, the Honourable Supreme Court has observed as under:-

> *"4. Needless to mention that while giving benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim "it is better that then guilty person be acquitted rather one innocent person be convicted. Reliance in this behalf can be made upon the cases of Tariq Pervez v. The State (1995 SCMR 1345) (Ghulam Qadir and 2 others v. The State (2008 SCMR 121), Muhammad Akram v. The State (2009 SCMR 230) and Muhammad Zaman v. The State (2014 SCMR 749)."*

18. For the foregoing reasons, this appeal is **ALLOWED**. The conviction and sentence of the appellants Muhammad Sadique and Misri Khan are set aside and they are acquitted of the charge by extending benefit of doubt to them. They shall be released from jail forthwith if not required to be detained in connection with any other case.

JUDGE

JUDGE