

IN THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha

Mr. Justice Zulfiqar Ali Sangi

CRIMINAL APPEAL NO.139 OF 2021

Appellant: Manzoor Ahmed s/o Shah
Muhammad through Mr. Umar
Farooq, Advocate.

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

Date of Hearing: 04.11.2022

Date of Announcement: 10.11.2022

JUDGMENT

Mohammad Karim Khan Agha, J:- The appellant Manzoor Ahmed son of Shah Muhammad was tried in the Court of Model Criminal Trial Court Extension/ Vth Additional Sessions Judge Karachi (East) in Session Case No.1022 of 2019 out of Crime No.71/2019 u/s. 6/9(c) of CNS Act, 1997 registered at PS Soldier Bazar, Karachi vide judgment dated 13.02.2021 and was convicted for offence punishable u/s.265-H(ii) Cr.P.C and sentenced to suffer life imprisonment with fine of Rs.10,00,000/- (Ten Lacs). Appellant was also extended the benefit of Section 382-B Cr.PC.

2. The brief facts of the prosecution case are that on 25.02.2019 the complainant SIP Hussain Dino during patrolling in the area received spy information that one truck bearing registration No.JV-3801, white and blue color having huge quantity of chars, hidden inside Apple Boxes will arrive from Golimar/Pak Colony, Love Lan Bridge, Karachi. On such information the complainant reached near Pakistan Quarter, opposite Good Luck Marriage Hall, Garden West Karachi. At about 1400 hours on the pointation of Spy informer the complainant stopped the said truck with the help of subordinate police officials. On query, driver disclosed his name as Manzoor Ahmed son of Shah Muhammad and the person sitting on the front seat next to the drivers seat disclosed his name as Muhammad Lal S/o, Bashir Ahmed. From personal search of accused Manzoor Ahmed cash amount of Rs.4300/-, two mobile phones viz. one Samsung Glaxy J7, Golden Color and Nokia Model 130 of

white color were recovered. Thereafter the complainant conducted search of the said truck and recovered 10 boxes/wooden made peties of chars amongst the boxes/wooden made peties of apple from the said truck. The complainant then weighed the recovered chars and found as under:-

- i) From four peties 12 packets of chars (in each petie) wrapped with yellow color plastic tape, weight of each packet 1150 grams, total weight of each petie 13800 grams, and total weight 55 kilo 200 grams chars was recovered.
- ii) From one petie 10 packets of chars wrapped with yellow color plastic tape, weight of each packet 1150 grams, total weighing 11 kilo 500 grams chars was recovered
- iii) From one petie 10 packets of chars wrapped with yellow color plastic tape weighing 1150 grams each, total weighing 11 kilo 500 grams chars, was recovered (on the packets value was written).
- iv) From two paties 24 packets of chars wrapped with yellow color plastic tape in which wording value was written in Urdu, weighing 1150 grams (each pack) total weighing 27 kilo 600 grams chars was recovered.
- v) From one petie 20 packets of chars, wrapped with chocolate and blue color plastic panni/pack, each packet weighing about 1150 grams, total weighing 23 kilograms chars on it wording LAVAZZA was written recovered.
- vi) From one petie 12 packets of chars, wrapped with yellow and cream color plastic pack/panni, each packet weighing 1400 grams, on packets New England COFFEE was written, total weighing 16 kilo 800 grams was recovered.

3. In total 145 Kilo 600 grams chars was recovered from the said peties. The complainant took one packet from each box/petie of chars from the said 10 recovered peties/boxes as samples, for sending the same for chemical examination and sealed the same on the spot. He also sealed the remaining chars in 10 peties/boxes separately on the spot. He took the said truck and 30 peties/boxes of apples into police custody so also arrested both the accused persons under the mashirnama of memo of arrest and recovery and brought the accused persons along with the recovered case properties at PS, where FIR of instant case was registered against accused persons.

4. After completion of investigation, the challan was submitted against the appellant/ accused and charge was framed to which he pleaded not guilty and claimed trial.

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5. The prosecution in order to prove its case examined 03 witnesses and exhibited various documents and other items. The statement of the accused was recorded under Section 342 Cr.P.C in which he denied the allegations leveled against him claiming false implication by the police. The appellant did not give evidence on oath and did not call any DW in support of his defence case.

6. After hearing the parties and 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.

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

8. Learned counsel for the appellant argued that he was completely innocent and had been falsely implicated by the police in order to show their efficiency; that there were contradictions in the evidence of the prosecution witnesses and as such it could not be safely relied upon; that the narcotics had been foisted on him; that safe custody and safe transmission of the narcotic to the chemical examiner had not been proven and as such the chemical report was without any legal value and as such for any or all of the above reasons the appellant should be acquitted of the charge by being extended the benefit of the doubt. Learned counsel has relied upon the cases of **Qaiser Javed Khan v. The State through Prosecutor General Punjab, Lahore and another** (PLD 2020 Supreme Court 57), **Khair-ul-Bashar v. The State** (2019 SCMR 930), **Ameer Zeb v. The State** (PLD 2012 Supreme Court 380), **Abid Ali v. The State** (2022 P Cr.LJ 1088), **Qaiser Khan v. The State through Advocate-General, Khyber Pakhtunkhwa, Peshawar** (2021 SCMR 363), **Shan v. The State** (2018 MLD 702), **Haji Inayat and another v. The State** (2010 P Cr.LJ 825), **Amanat Ali and 2 others v. The State** (2008 SCMR 991), **Tariq Pervez v. The State** (1995 SCMR 1345) and **Nazeer Ahmed v. The State** (PLD 2009 Karachi 191).

9. Learned Additional Prosecutor General Sindh has fully supported the impugned judgment and has submitted that the appellant was caught red handed on the spot and narcotics were recovered from the truck which he was driving hidden in boxes containing apples; that safe custody of the narcotic had been proven and the recovered narcotic produced a positive chemical report and as such,

the prosecution had proved its case beyond a reasonable doubt and the appeal should be dismissed.

10. We have heard the arguments of the learned counsel for the appellant 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 appellant and the impugned judgment with their able assistance.

11. In narcotic cases, one of the most 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 safe 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 recovery whether small or huge as the principle remains the same. In this case the appellant was arrested by the police on 25.02.2019 when the recovery of the narcotic was made from the truck which the accused was driving. According to PW 1 who was the complainant in this case who made the arrest and recovery from the appellant he gave the recovered narcotic to the IO. The IO then *apparently* placed it in the malkhana where it remained for 2 days before being sent for chemical examination. However no malkhana entry was exhibited and neither the head of the malkhana nor anyone working at the malkhana was examined to prove this fact. PW 3 Asif Raza Khawaja who was the IO of this case on this point stated in material part in his evidence as under;

"The complainant handed over case property to me. The case property was kept in the Malkana. I have not noted entry registration No.19 about the case property. I cannot say whether the complainant has taken out case property from the Malkhana. I sent the samples of case property taking parcels from the Malkhana. It is correct that I have not produced any entry from register No.19. Usually head Mohrar of PS was in charge of Malkhana. I have not recorded the statement of in charge Malkhana head Mohrar Ch. Zahid" (bold added)

12. The narcotic reached the chemical examiner for his report 2 days later on 27.02.2019. As mentioned above however the prosecution has not produced any evidence in respect of the safe custody of the narcotic during this period. The malkhana in charge was not examined and no malkhana entry was produced in evidence by the prosecution to prove the safe custody of the narcotic and it was even unclear whether the complainant had entered the malkhana during this period

and taken the narcotic out before replacing it again as such it is unclear where the narcotic was for this 2 day period before it was taken for chemical examination on 27.02.2019 and as such during this period the narcotic might have been tampered with. 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 and as such the chemical report is of no legal value to the prosecution in proving the recovered narcotic.

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 Khan 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 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)."

14. Thus for the reasons mentioned above we find that the prosecution has not proved its case beyond a reasonable doubt against the appellant especially in terms of proving safe custody of the narcotic and hence by being extended the benefit of the doubt the appellant is hereby acquitted of the charge. The appellant shall be released forthwith unless he is wanted in any other custody case.
15. The appeal stands disposed of in the above terms.