

**IN THE HIGH COURT OF SINDH, KARACHI**

*Present:*

*Mr. Justice Mohammad Karim Khan Agha  
Mr. Justice Zulfiqar Ali Sangi,*

**CRIMINAL APPEAL NO.650 OF 2021.**

**Appellant:** Mewa Khan S/o. Murad Ali through  
Mr. Tahir Rahim, Advocate.

**Respondent:** The State through Mr. Abrar Ali  
Khichi, Additional Prosecutor General  
Sindh.

**Date of hearing:** 18.11.2022.

**Date of Announcement** 24.11.2022.

**JUDGMENT**

**MOHAMMAD KARIM KHAN AGHA, J:-** The appellant Mewa Khan s/o. Murad Ali has preferred this appeal against the judgment dated 26.10.2021 passed by the VIIIth Additional District & Sessions Judge/Additional Model Criminal Trial Court, Karachi West in Sessions Case No.741 of 2020 arising out of Crime No.448 of 2020 U/s. 6/9-C of the CNS Act, 1997 registered at P.S. SITE-A, Karachi whereby the appellant was convicted u/s.265-H(ii) Cr.P.C. for the offence under section 6/9-C of CNS Act, 1997 and sentenced to Life Imprisonment with fine of Rs.100,000/-. In the event of failure to pay the fine he was ordered to undergo S.I. for 06 months more. The benefit of section 382-B Cr.P.C. was also extended to the appellant.

2. The facts of the prosecution case are that the complainant ASI Muhammad Ali of PS SITE-A left PS along with PC Rameez, PC Shehryar and DHC Khalid Rehman for patrolling in police mobile No.SPD-394. During patrolling from different places when he reached at Post Office Chowrangi, Estate Avenue Road, SITE Karachi at 2330 hours, he saw that one rickshaw was coming from DC Office, Habib Bank Chowrangi, in suspicious condition. The complainant stopped the Rickshaw and on inquiry the driver of Rickshaw disclosed his name as Mewa Khan son of Murad Ali. On search of Rickshaw, the complainant ASI Muhammad Ali recovered one cloth bag of different color from under the back seat of Rickshaw containing 10 packets of chars. On 5 packets of chars R-10-K was written with blue marker and on 5 packets R-11

was written which were wrapped with yellow color tape. The weight of chars was 12 Kilograms. Then he prepared the memo of arrest and recovery and sealed the case property on the spot. He brought the accused and case property at PS and lodged the FIR against the accused.

3. After completion of investigation I.O. submitted charge sheet against the accused Mewa Khan to which he pleaded not guilty and claimed trial.

4. The prosecution in order to prove its case examined 03 witnesses and exhibited various documents and other items. The appellant in his S.342 Cr.PC statement denied the allegations against him however he did not give evidence on oath or call any DW in support of his defence case.

5. 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.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 26.10.2021 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 appellant has contended that he is completely innocent and has been falsely implicated in this case by the police in order to show their efficiency; that the recovered narcotic was foisted on him by the police; 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 **Momin Khan v The State** (2009 MLD 122) and **Hakim Ali v The State** (2001 P Cr. L J 1865).

8. On the other hand learned Additional Prosecutor General Sindh appearing on behalf of the State has fully supported the impugned judgment. In particular he has stressed that the accused was caught red handed on the spot in possession of a large quantity of narcotics which could not have been foisted; that the witnesses have fully implicated the appellant in this case and since they



had no ill will or enmity towards the accused there evidence could be safely relied upon; that safe custody and safe transmission of the narcotic to the chemical examiner had been proved which lead to a positive result and as such the prosecution had prove its case against the accused beyond a reasonable doubt and the appeal be dismissed. In support of his contentions he placed reliance on the cases of **The State v Abdali Shah** (2009 SCMR 291), **Balochistan Trading Company (Pvt.) Ltd. v National Bank of Pakistan** (1998 SCMR 1899), **Mushtaq Ahmad v The State** (2002 SCMR 474), **Mehboob-ur-Rehman v The State** (2010 MLD 481), **Shafa Ullah Khan v The State** (2021 SCMR 2005) and **Zafar v The State** (2008 SCMR 1254).

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. 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 huge as the principle remains the same. In this case the appellant was arrested by the police on 18.09.2020 when narcotics weighing 12-kg was recovered from a rickshaw which the appellant was driving. Those narcotics initially remained with the complainant (PW 1 Muhammed Ali) until he handed them over to the IO of the case in the morning (i.e 19.09.2020) as confirmed by the evidence of the IO who was PW 3 Abdul Shakoore who did not inquire where the complainant had kept the case property during the night. PW 2 Muhammed Ramiz only states that the complainant brought the case property to the PS. He does not say who the narcotic was given to or where it was kept. It appears therefore that the complainant kept the case property with him over night before handing it to the IO and as such during this period the complainant could have tampered with the recovered narcotic. It is also unclear from the evidence of the IO PW 3 Abdul Shakoore when he took the narcotic to the chemical examiner however his exhibited letter to the chemical examiner is dated 21.09.2020 and the chemical report states that it was received from him on

21.09.2020. Thus it appears that the recovered narcotic was taken to the chemical examiner 3 days after its recovery. According to PW 3 Abdul Shakoor the case property was lying in the Malkhana however there is no evidence to this effect as in his evidence he did not produce any malkhana entry (nor did any other PW) and he admitted that he had not recorded the statement of the Malkhana in charge. Thus, 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 appellant till the time when the same was sent for chemical examination as it appears that the narcotic was unaccounted for for three days during which time it could have been tampered with and as such the chemical report is of no legal 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** ((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)."

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 the possibility of the narcotic being tampered 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.

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

Announced in open Court on 24-11-22

Kty 2  
 Mahamud Kair Khan Aghe J.

  
 Arshad Hussain Khan J.