

**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT HYDERABAD**

Before:

Mr. Justice Mohammad Karim Khan Agha
Justice Mrs. Kausar Sultana Hussain

Cr. Appeal No.D-136 of 2019

Dil Sher

Versus.

The State.

Appellant : Dil Sher (present on bail)	through Mr. Farhad Ali Abro, Advocate
Respondent : The State	Mr. Agha Abdul Nabi, Special Prosecutor ANF
Date of hearing	14.02.2023
Date of judgment	28.02.2023

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.-This criminal appeal is directed against the judgment dated 23.07.2019, passed by the learned Ist. Additional Sessions Judge, Shaheed Benazirabad, in Special Narcotic Case No. 576 of 2015, arising out of Crime No.18 of 2015, registered at Police Station ANF Sukkur, under section 9(c) of Control of Narcotic Substances Act, 1997, whereby the appellant after full-fledged trial has been convicted under the said section and sentenced to suffer imprisonment for 08 years and 06 months and to pay fine of Rs.40,000/-. In case of default in payment of fine he was ordered to suffer simple imprisonment for 07 months more. Benefit of Section 382-B Cr.P.C. was also extended to the accused.

2. The brief facts of the prosecution case as narrated in the FIR are as under:-

"On 11.09.2015, the complainant was available at P.S ANF Sukkur where he received spy information that one Fazal Khan would arrive at 1600 hours in his white colour corolla car bearing registration No.BDX-489 near Rangers Petrol Pump Nawabshah on bypass road Nawabshah for supplying narcotics. On receipt of spy information, SHO Asim Raza, HC Ayaz Ahmed, HC Sher Muhammad and other staff of PS ANF Sukkur left on government vehicle alongwith the spy and under supervision of Assistant Director Mashooque Ali Brohi, Incharge PS ANF Sukkur vide daily diary entry No.11 at 1230 hours. The above mentioned officials of ANF reached pointed place at 1630 hours and spotted white colour Toyota Corolla GLI Car bearing registration No.BDX-489, available by road side. The spy disclosed that the above mentioned car belonged to Fazal Khan. The driving seat of above mentioned car was vacant while a person was found sitting on front seat of the car who was apprehended. Few persons were asked on the spot to act as mashir but they refused therefore, HC Ayaz Ahmed and HC Sher Muhammad were appointed as mashirs. The apprehended person disclosed his name as Dil Sher son of Amir-ud-Din Rind resident of village Bahadur Khan Kaloi Taluka Shahdadpur District Sanghar and further disclosed that Fazal Khan, driver of the car had alighted from the car and has not returned back. The apprehended person expressed ignorance about availability of narcotics in the vehicle. However, the above mentioned vehicle was searched and six packets of charas wrapped in yellow colour tape were recovered underneath the driving seat of the car. The recovered pieces of charas were weighed and each piece was found to be one kilogram in weight and total weight of charas was found to be six kilograms. Ten grams of charas were taken out from each packet of charas and sealed separately for the purpose of chemical examination while the remaining pieces of charas were sealed separately. The above named accused was arrested and Rs.750/- in shape of currency notes of various denominations were recovered from pocket of his shirt. The accused disclosed his age as 16 years and further disclosed that he has been student and has no connection with recovered charas. The above mentioned car was taken into possession alongwith keys. After preparing mashirnama of arrest and recovery, the recovered case property was taken at P.S ANF Sukkur where FIR was registered on behalf of the State."

3. After usual investigation, the case was challaned and the learned trial Court framed charge against the accused to which he pleaded not guilty and claimed to be tried.
4. At trial, in order to prove its case, the prosecution examined 02 witnesses and exhibited various documents and other items. The appellant in his statement recorded under Section 342 Cr.P.C denied

the prosecution's allegations by pleading his innocence; he, however, did not examine himself on oath or any one in his defense.

5. On conclusion of the trial after hearing the parties and assessing the evidence on record the learned trial Court found the appellant to be guilty for the above said offence and then convicted and sentenced him as set out earlier in this judgment, which is impugned by the appellant before this Court by way of instant appeal.

6. Learned trial Court in the impugned judgment had already discussed the facts and the evidence in detail and there is no need to repeat the same here, so as to avoid duplication and unnecessary repetition.

7. Learned advocate for appellant has mainly contended that prosecution case is highly doubtful; that this is a case of advance information and despite the place of incident was located at busy spot, yet, none from general public was picked up and joined as mashir to attest the arrest and recovery; that there are material contradictions in prosecution evidence, hence it cannot be relied upon; that the police official, who per prosecution case took the narcotic substance for Chemical analysis was not examined to show the safe transportation and delivery of the same, hence tampering with the case property could not be ruled out. He further argued that accused has been involved in this case falsely.

8. The learned Special Prosecutor ANF has supported the impugned judgment and contended that the witnesses have fully supported the prosecution case; their evidence was without any contradictions and they have corroborated their evidence on each and every point; that safe custody of the narcotic has been proven which lead to a positive chemical report and as such the prosecution has been able to prove its case against the appellant beyond any shadow of reasonable doubt, hence the impugned judgment may be maintained and the appeal may be dismissed.

9. We have carefully heard the learned counsel for the parties and gone through the entire evidence with their able assistance.

10. At the very outset it is noted 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 unreliable and 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 11.09.2015 when narcotics weighing 6Kgs were recovered from a car in which he was travelling. Those narcotics according to the evidence of the complainant were taken to the PS and were kept in the malkhana for safe keeping. The mashir of the case in his evidence does not state where the narcotics were kept when they were taken to the PS. After 3 days of their recovery the narcotics were taken to the chemical examiner at Rohri by HC Ayaz Ahmed. Even at this stage the malkhana in charge had not been examined to show that the narcotics had been kept in the malkhana safely for 3 days nor was any malkhana entry produced to show that the narcotics had even been deposited in the malkhana for this 3 day period and as such there was no evidence where the narcotics had actually been during this 3 day period when they were meant to be kept in safe custody and as such could easily have been tampered with over this 3 day period. According to the letter sent to the chemical examiner by the IO dated 14.09.2015 the narcotics were taken to the chemical examiner by HC Ayaz Ahmed however Ayaz Ahmed was not examined to prove safe transmission of the narcotic from the malkhana to the chemical examiner and as such the narcotic could have been tampered with as well whilst it was being sent to the chemical examiner. Thus, even at this stage the prosecution has failed to prove both safe custody and safe transmission of the narcotic to the chemical examiner. As it turns out the chemical examiner at Rohri had retired on 21.07.2015 which lead to the narcotic being returned by the chemical laboratory at Rohri to the police at Sukkur on 09.10.2015 nearly one month after,

its original recovery. There is no evidence on record as to how the narcotic was returned from the chemical laboratory to the police. For example, was it sent by TCS or collected by a policeman or delivered by someone working at the narcotics laboratory? In any event the recovered narcotic was now sent to Karachi for testing through HC Sher Muhammed who was not examined to prove safe transmission of the narcotic to the chemical laboratory in Karachi. The chemical report ultimately proved positive. Thus, based on the particular facts and circumstances of this case and the above discussion we find that the prosecution has **not** been able to prove safe custody of the narcotics from the time when they were recovered from the appellant till the time when the same was sent for chemical examination as it appears that the narcotics were not accounted for for 3 days and there is even no evidence as to who actually took the recovered narcotics from the PS to the chemical examiner after this three day period during which time the narcotics could have been tampered in with whilst in transit to the chemical examiner. There is also no evidence to prove the safe transmission of the narcotic from the laboratory in Rohri to the laboratory in Karachi and as such we find that the prosecution has failed to prove both the safe custody and safe transmission of the narcotic to the chemical examiners which means that the narcotics could have been tampered with which renders the chemical report unreliable and of no legal value to the prosecution in proving the recovered narcotics.

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 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 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.** 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).”(bold added)

12. Thus for the reasons mentioned above we find that the prosecution has failed to prove safe custody and safe transmission of the narcotic from the time when it was recovered from the appellant 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's bail bonds are cancelled and he is free to go.

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