

Narcotics : No Safe Custody

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IN THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha  
Mr. Justice Khadim Hussain Tunio,

Criminal Appeal No.329 of 2022.

Appellant

Fayyaz Khan S/o. Badam Shah through  
M/s. Asif Ibrahim along with Syed  
Habib Khalid, Advocates.

Respondent

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

Date of hearing

20.04.2023.

Date of Announcement

26.04.2023.

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellant Fayyaz Khan S/o. Badam Shah was tried in the Court of VIIIth Additional District & Sessions Judge/ Additional Model Criminal Trial Court, Karachi West in Sessions Case No.52/2021 in respect of FIR No.402/2022 U/s. 6/9(C) of CNS Act, 1997 registered at P.S. Jackson, Karachi and vide judgment dated 20.04.2022 the appellant was convicted under section 9(c) of CNS Act, 1997 and sentenced to undergo R.I. for 07 years and 06 months along with fine of Rs.55,000/-. In default in payment of fine he was ordered to undergo S.I. for six months more. 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 Fayyaz Khan son of Badam Shah vide entry No.55-0130 hours and who disclosed that he along with PC Sher Muhammad, PC Mansif Ali, PC Nazish and PC Asif apprehended the accused Mehboob Ali Jaffary son of Ghulam Abbas 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.641, 3<sup>rd</sup> floor, Poona Apartments, Majeed Colony, Kemari, Karachi and reached over there at 0340 hours. The accused Fayyaz Khan son of Badam Shah voluntarily led the police party in his house and took out one plastic shopper of black color from the cupboard containing 07 packets of charas wrapped with yellow color tape. The word "A" was written on each packet. The weight of charas was 08 kilo 200 grams (8200 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 person.

3. After completion of usual investigation the matter was challaned and the appellant was sent up for trial where he pleaded not guilty to the charge.

4. The prosecution in order to prove its case examined 04 Prosecution Witnesses and exhibited numerous documents and other items. The accused in his statement under section 342 Cr.P.C. denied the allegations against him. However, he did not give evidence on oath and he did not 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 above along with fine, 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 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 by the police in order to show their efficiency; that there are material contradictions in the evidence of the witnesses which renders their evidence unreliable; 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 extending the benefit of the doubt. In support of his contentions he has placed reliance on the cases of *Nizbat Mehmood v. The State through S.I. Police Station Bara Kahu, Islamabad* (2021 YLR 27) and *Mst. Mariam alias Maria alias Shakeeba v. The State and another* (2019 YLR 2082).

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; the chemical report was positive and as such the prosecution had proved its case against the accused beyond a reasonable doubt and the appeal 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. 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.

11. At the very outset we have noted that the co-accused Sher Muhammad Khan was acquitted by this Court vide Judgment dated 20.12.2022 on the basis that the prosecution had failed to prove safe custody and transmission of narcotics substance. The facts of the appellant's case are same as in the case of Sher Muhammad Khan (*supra*). When confronted with this proposition, learned Additional Prosecutor General Sindh conceded the same that the prosecution case suffers from the same defects.

12. In this case after examination of the record we find that case of the appellant is on the same footings as the appellant co-accused Sher Muhammad Khan and Mehboob Ali Jaffery who are both acquitted for the same offence based on the same facts since the prosecution had failed to prove safe custody of the narcotics and safe transmission of the narcotics substance as is mandatory requirement of the law as held in the case of *Qaiser v. The State* (2021 SCMR 363).

13. This being the case, we find that the chemical report is of no legal value as narcotic substance might have been tampered after its recovery and after its transmission to the chemical examiner and as such the appellant by extending the benefit of doubt is acquitted of the charge. The impugned judgment is set-aside and the appeal is allowed. The appellant shall be released forthwith unless he wanted in any other custody case.

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