

Narcotics : No Safe Custody

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IN THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha J.

Mr. Justice Zulfiqar Ali Sangi J.

CRIMINAL APPEAL NO. 670 OF 2021

Appellant : Basit Khan Barki through Mr. Ajab Khan Khattak, Advocate.

Respondent : The State through Mr. Ali Haider Saleem, Addl. P.G.

Date of Hearing : 28.10.2022

Date of Judgment : 01.11.2022.

J U D G M E N T

Muhammad Karim Khan Agha-J., Appellant found guilty was convicted by learned VIII- Additional Sessions Judge/MCTC Karachi West in Sessions Case No.301/2021 bearing Crime No.532/2020 U/s 9(C) CNS Act of CNS Act, 1997 of P.S. Peerabad, Karachi U/s 9(C) of CNS Act and sentenced to suffer life imprisonment with fine of Rs.100,000/- (One Lac), in default to suffer SI for six months with benefit u/s 382-B Cr.P.C vide judgment dated 23.11.2021. By means of this appeal, appellant has assailed his conviction and sentence.

2. The brief facts of prosecution case as per FIR are that complainant ASI Muhammad Hafeez along with police party during patrolling when reached near Shahzad Cinema, main Manghopir road, Karachi at 0015 hours, and during checking apprehended appellant while coming on motorcycle No.DNY-7052 and recovered 26 Kilograms and 965 grams of charas from him. He took appellant and recovered property to P.S. and lodged FIR.

3. After usual investigation the charge was framed against the accused person and he was sent-up to face the trial where he plead not guilty to the charge.

4. 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. The appellant did not give evidence on oath and 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 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 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 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 bike which he was allegedly riding at the time of his arrest and recovery of the narcotics had not been produced before the trial court; 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 **Shafqat Ali Vs. The State & another** (PLJ 2018 Cr. C(Lahore) 437), **Habib Nawaz Vs. State & another** (PLJ 2019 Cr. C (Note) 56), **Azjjar Hussain Vs. State** (PLJ 2019 Cr.C (Note) 48), **Abdul Ghani & others Vs. The State** (2019 SCMR 608), and **Kamran Shah and others Vs. The State** (2019 SCMR 1217).

8. Learned Additional Prosecutor General Sindh has fully supported the impugned judgment and has submitted that the appeal is without merit and should be dismissed. He has relied upon the cases of **The State/ANF Vs. Muhammad Arshad** (2017 SCMR 283), **Asmat Ali Vs. The State** (2020 SCMR 1000), **Muhammad Hanif Vs. The State** (2003 SCMR 1237) and **Shazia Bibi Vs. The State** (2020 SCMR 460).

9. 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.

10. 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 custody cannot be proved by the prosecution then the chemical report is of no 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 07.11.2020 when the recovery of the narcotic was made from him on the spot. The narcotic reached the chemical examiner for his report 2 days later on 09.11.2020. The prosecution however has not produced any evidence in respect of the safe custody of the narcotic during this period. The malkana 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 as such it is unclear where the narcotic was for this 2 day period before it was taken for chemical examination on 09.11.2020 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 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 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 bell 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 not proved its case beyond a reasonable doubt against the appellant 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.

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