

IN THE HIGH COURT OF SINDH, KARACHI

Present:

*Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Arshad Hussain Khan,*

Criminal Appeal No.286 of 2022.

Appellant: Mehboob Ali Jaffery S/o. Ghulam Abbas through Mr. Muhammad Hanif Samma, Advocate.

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

Date of hearing: 14.12.2022.

Date of Announcement: 19.12.2022.

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellant Mehboob Ali Jaffery S/o. Ghulam Abbas has preferred this appeal against the judgment dated 20.04.2022 passed by the VIIIth Additional District & Sessions Judge/Additional Model Criminal Trial Court, Karachi (West) in Sessions Case No.42 of 2021 arising out of Crime No.395 of 2020 U/s. 6/9(c) of Control of Narcotic Substance Act, 1997 registered at P.S. Jackson, Karachi whereby the appellant was convicted and sentenced to undergo R.I. for 06 years and 06 months along with fine of Rs.40,000/-. In failure to pay the 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 27.10.2020 the complainant ASI Shabbir Hussain Awan of PS Jackson left PS alongwith police staff namely PC Asif, PC Fayaz Khan and DPC Sher Muhammad for patrolling in police mobile. During patrolling from different places he received spy information that one person is going to supply the narcotics in his Rickshaw. On receipt of said information he reached at Jackson Bazar near KPT Hall, Keamari, Karachi at 0030 hours on 28.10.2020 where he saw that one rickshaw was coming. On pointation of spy informer he got stopped the rickshaw. The driver of the rickshaw disclosed his name as Mehboob Ali Jaffery son of Ghulam Abbas and on search of rickshaw, ASI recovered one bag containing 06

packets of charas from under the back seat of the rickshaw. All the packets of charas were wrapped with yellow colour tape and the word "A" was written on each packet. The weight of charas was 06 kilograms (6000) grams. On his personal search ASI recovered Rs.2000/-, NIC Card and one mobile phone from his possession. He also took the rickshaw No.D-20-07464 into police custody. 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 to the Police Station where he lodged the FIR against the accused.

3. After completion of investigation I.O. submitted charge sheet against the arrested appellant accused Mehboob Ali Jaffery 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 claimed false implication however he did not examine himself on Oath or call any DW in support of his defence case.

5. After 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 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 being extended the benefit of the doubt. In support of his contentions he has placed reliance on the cases of

Nizabat 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; 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.

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 27.10.2020 when narcotics weighing 6-kgs was recovered from a rickshaw which the appellant was driving. Those narcotics according to the evidence of the complainant were taken to the PS. However he does not state in his evidence where he kept the narcotics. PW 2 Asif who is the mashir of the memo of arrest and recovery is of no assistance in this regard as in his evidence he does not mention where the narcotics were kept or who they were given to on their return to the PS. PW 3 Alam who is the IO of the case states that he took the narcotics from the malkhana on 29.10.2020 (a day after their recovery) from the malkhana to the chemical examiner. However during cross examination he admitted that he did not examine the in charge of the malkhana as a witness in order prove safe custody and nor did he

exhibit any malkhana entry to prove that the narcotics were kept in the malkhana. Thus, there is no evidence that the complainant placed the recovered narcotic immediately in the malkhana, that it was actually put in the malkhana as neither the malkhana in charge was examined nor any entry was exhibited which even showed that the property had been kept at all in the malkhana. 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 as it appears that the narcotic was unaccounted for at least a day 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 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 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.