

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Special Criminal Appeal No. D-25 of 2024

PRESENT

Mr. Justice Khadim Hussain Tunio, J
Mr. Justice Ali Haider 'Ada', J.

Appellant : Jinsar Ali son of Zulfiqar Ali Kanhar.
Through Mr. Saeed Ahmed Lund, Advocate.

State. : Through Mr. Khalil Ahmed Maitlo,
Deputy Prosecutor General Sindh.

Dates of hearing: : 05-03-2025
Date of Decision : 05-03-2025
Date of Reason : 18-03-2025

JUDGMENT

Ali Haider 'Ada', J - This appeal is directed against the judgment dated 06.02.2024, passed by the learned Additional Sessions Judge-I/Special Judge for CNS, Khairpur, in Special Case No. 247 of 2023, arising out of FIR No. 44 of 2023, registered under Section 9(b) of the CNS Act at Police Station Ahmedpur, District Khairpur. By the impugned judgment, the appellant was convicted and sentenced to undergo three (03) years of imprisonment and to pay a fine of Rs. 10,000/- (Rupees Ten Thousand). In case of non-payment of the fine, the appellant was ordered to suffer an additional three (03) months of simple imprisonment. However, he was granted the benefit of Section 382-B Cr.P.C.

2. The brief facts of the prosecution's case are that on 08.06.2023 at 0800 hours, the accused/appellant, Jinsar, was arrested from the bridge of Lalan Wah, Taluka Kingri, by a police party from Police Station Ahmedpur, led by complainant ASI Allah Dino Narejo. During the search, the complainant allegedly recovered 1300 grams of hemp (Bhang) from the accused's possession, which was contained in a black plastic shopper, in the presence of mashirs (witnesses) PC Shahnwar Shar and PC Altaf Hussain Bhugti. The recovered substance was sealed on the spot, and a memo of arrest and recovery was prepared accordingly. Subsequently, the accused and the recovered property were taken to the police station, where the complainant lodged the FIR.

3. After registration of FIR the investigation was carried and finally the challan was submitted for offence u/s 9 (b) of CNS Act, 1997 and the case was sent-up for trial.

4. On 25.09.2023, the trial court framed charges against the accused at Ex.2, to which he pleaded not guilty and claimed trial, as per his plea recorded at Ex.2-A. During the trial, the prosecution examined four witnesses to establish its case. PW-1, complainant ASI Allah Dino Jamro, was examined at Ex.3; during his examination-in-chief, he produced roznamcha entries No. 24 and 2, the memo of arrest and recovery, the FIR, and roznamcha entry No. 3, marked as Ex.3/A to Ex.3-D. PW-2, PC Shahnawaz Shar, a mashir, was examined at Ex.4 and produced roznamcha entry No. 4 and the memo of the place of incident, marked as Ex.4-A to Ex.4-B. PW-3, WHC Nale Mitho Mari, was examined at Ex.5 and produced an attested copy of entry No. 16 of Register No. 19, marked as Ex.5-A. PW-4, SIP/Investigating Officer Ameer Hussain Mahar, was examined at Ex.6, where he produced roznamcha entries No. 7 and 12, a letter addressed to the Chemical Examiner, the Road Certificate (RC), and the Chemical Report, marked as Ex.6-A to Ex.6-E. The statement of the accused was recorded under Section 342 Cr.P.C. at Ex.8, wherein he denied the prosecution's allegations and claimed false implication in the case. However, the accused neither examined himself on oath under Section 342(2) Cr.P.C. nor led any evidence in his defense to disprove the prosecution's case.

5. Learned Additional Sessions Judge-I/Special Judge for (CNS), Khairpur after hearing the learned counsel for the parties and examining the evidence available on record, by judgment dated 06.02.2024 convicted and sentenced the appellant as stated above, and appellant through this appeal assails the same judgment before this Court.

6. We have carefully heard learned counsel for the parties and perused the material available on record.

7. According to the roznamcha entry recorded by the complainant, it is revealed that he submitted the FIR to the IO for investigative purposes. However, this entry fails to establish the chain of custody for the case property. During his examination-in-chief, the complainant initially stated that he prepared the memo of recovery and arrest on the spot in the presence of mashirs. However, during

cross-examination, he contradicted himself by stating that the said memo was prepared by PC Altaf Hussain, the second mashir, under his directions. This assertion was further challenged by other witnesses, who testified that the memo was, in fact, prepared by the complainant himself. Additionally, the complainant testified that a personal search of the accused was conducted by a witness, whereas that witness contradicted this statement, asserting that the complainant himself conducted the search. Furthermore, WHC Nale Mitho Mari deposed that he recorded entry No. 16 in Register No. 19 to document the placement of the seized case property in the Malkhana, stating that the property was entrusted to him by the IO. However, upon reviewing the register entry, it became evident that the entry was actually made by the IO himself, rather than WHC Nale Mitho. During cross-examination, the WHC admitted that there was overwriting in entry No. 16 of Register No. 19, which was also apparent upon perusal of the record. In this regard, reliance is placed upon the case of *Rustam Ali Shar v. The State (2024 P.Cr.L.J 68)*, where it was held that the police party had left the police station vide roznamcha entry No. 2 at 0710 hours, but there was overwriting in the entry number, and the prosecution failed to furnish any explanation. Similarly, in *Anwar Ali v. The State (2023 MLD 535)*, this Court held that roznamcha entry No. 3, by which the Excise Official had left the police station, was produced at Ex. 9/A, but there was overwriting in the said roznamcha entry, and therefore, no reliance could be placed upon the departure entry. It is a well-settled principle of law that if there exists even a single circumstance that creates doubt in the prosecution's case, the benefit of such doubt must be extended to the accused. Reliance is placed on *Ikramullah & others v. The State (2015 SCMR 1002)* and *Tariq Pervaiz v. The State (1995 SCMR 1345)*.

8. The Investigating Officer, during his testimony, stated that he arrived at the scene of the incident using the police mobile vehicle. However, another witness contradicted this claim, stating that they reached the location in a private vehicle. According to the prosecution, the appellant/accused was found in possession of hemp (bhang), which was later sent to the Chemical Examiner for analysis. The Chemical Examiner's report confirmed that the seized substance was indeed hemp. Therefore, before proceeding further, it is essential to first address the definition of "hemp" under the Control of Narcotic Substances (Amendment) Act, 2020, which is as follows:

- 2(d) **“Cannabis (hemp)” means----**
 (i)

- (ii) The flowering or fruiting tops of the Cannabis plant (excluding the seed and leaves when not accompanied by the tops) from which the resin has not been extracted by whatever name they may be designated or known [and include all forms known as bhang, siddhi or ganja] and
- (iii) Any mixture with or without neutral materials of any of the above forms of cannabis or any drink prepared therefrom;

9. In separate piece of legislation, the hemp is defined in Cannabis Control and Regulatory Authority Ordinance, 2024. The Section-2(1) provides definition of “hemp” means variant of cannabis plant; and such Cannabis plant is defined in Ordinance, 2024 specified in Section-2(d) which says that;

- (d). “Cannabis plant” means a plant of cannabaceae family including Cannabis sativa, Cannabis indica and Cannabis ruderalis. The Cannabis plant has number of active ingredients which are collectively called Cannabinoids including but not limited to,-

10. In 7th Edition of Parikh’s Textbook of Medical Jurisprudence, Forensic Medicine and Toxicology, the bhang/hemp is defined as under;

- 1. Bhang; Also known as siddhi, patti, or sabji, it is prepared from the dried leaves and fruit shoots which are used as an infusion in the form of beverage. It contains the active principle in a concentration of 15% and is the least potent.

11. We have examined the report in such aspect, in which revealed that the description of article as mentioned in report as parcel contained material of “dried greenish broken leaves, straw and seeds and a small stalks kept in black shopper. In this context the case of *Abdul Jaleel v. The State* reported in 2000 P.Cr.LJ 760) is essential to be discussed as it was held by this Court that;

“The definition of cannabis (hemp) given in Section 2(D) is reproduced below;

“the flowering or fruiting tops of the cannabis plant (excluding the seed and leaves when not accompanied by the tops from which the resin has not been extracted by whatever name they may be designated or known; and “

This definition clearly shows that the stuff must contain flowering or fruiting tops of the cannabis plant (excluding the seed and leaves when not accompanied by the tops). In the instant case as per Expert Report, the recovered stuff is as under:-

“Dried greenish broken leaves, straw and seed.”

The distinguishing quality in-between the provision of law and the recovered stuff is of much importance and stuff alleged recovered does not fulfil the requirements of cannabis (hemp) as defined in section 2(D)(ii) of Act.

12. In the present case the recovered material is classified differently from hemp/ cannabis plant as it does not mean crucial for being considered as cannabis plant. A review of chemical report indicates a clear deviation from established protocols regarding the examination of contraband substance as adherence to protocol is paramount importance, but prosecution failed to elucidate this particular element. Reliance is place upon the *case of Khair-ul-Bashar Vs The State (2019 SCMR 930)* and case of *The State through Regional Director ANF Vs Imam Bakhsh & others (2018 SCMR 2039)*.

13. Nonetheless, the prosecution has failed to discharge its burden with record to proof of the material being hemp-bhang within purview of guidelines demonstrate as well failed to establish the case beyond any reasonable doubt. In case reported in **2018 SCMR 2039**, it was further held that;

9. We have noted above that in *Criminal Appeals Nos. 523 to 525/2017 and No.22/2018*, safe custody and safe transmission of the alleged drug from the spot of recovery till its receipt by the Narcotics Testing Laboratory are not satisfactorily established. The chain of custody begins with the recovery of the seized drug by the police and includes the separation of the representative sample(s) of the seized drug and their dispatch to the Narcotics Testing Laboratory. This chain of custody, it pivotal, as the entire construct of the Act and the Rules rests on the Report of the Government Analyst, which in turn rests on the process of sampling and its safe and secure custody and transmission to the Laboratory. The prosecution must establish that the chain of custody was unbroken, unsuspecting, indubitable, safe and secure. Any break in the chain of custody

or lapse in the control of possession of the sample, will cast doubts on the safe custody and safe transmission of the samples) and will impair and vitiate the conclusiveness and reliability of the Report of the Government Analyst, thus, rendering it incapable of sustaining conviction. This Court has already held in Amjad Ali v. State (2012 SCMR 577) and Ikramullah v. The State (2015 SCMR 1002) that where safe custody or safe transmission of the alleged drug is not established, the Report of the Government Analyst becomes doubtful and unreliable.

14. In view of forgoing reasons, the instant Special Crl. Appeal was allowed, consequently, impugned judgment dated 06-02-2024 passed by learned 1st Additional Sessions/Special Judge (CNS) Khairpur in Special Case No. 247 of 2023 arising out of FIR No. 44/2023 registered at Police Station Ahmedpur, District Khairpur, for offence u/s 9 (b) CNS Act, 1997 was set aside and the appellant Jinsar Ali son of Zulfiqar Ali by caste Kanhar was acquitted of the charge while extending him benefit of doubt.

15. These are the reasons of our short order dated 05-03-2025.

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Ihsan/P.A