IN THE HIGH COURT OF SINDH, AT KARACHI

Criminal Appeal No. 565 of 2020

Present:-
Yousuf Ali Sayeed &
Adnan Iqbal Chaudhry, JJ

Appellant	:	Wakeel, through Mr. Ashraf Ali Shah, Advocate.
Respondent	:	The State through Mr. Muhammad Iqbal Awan, APG
Date of hearing	:	28.06.2021

JUDGMENT

YOUSUF ALI SAYEED, J. The Appellant was arrested on 20.05.2020 at 1230 hours from Naddi Kinara opposite Jan Muhammad Village, Lyari Express Way, Gulbahar, Karachi, with a slab of charas weighing 1025 grams *inter alia* shown to have been recovered from his possession, which was then sealed for onward transmission to the Chemical Examiner with a Memo as to the arrest and seizure being prepared on the spot by SIP Bashir Jutt (the "**Complainant**"), who headed the police party and conducted the search. The First Information Report, bearing Crime Number 75 of 2020 (the "**FIR**"), was then registered in the matter by the Complainant at P.S. Gulbahar at 1330 hours on the same day under Sections 6 and 9 (C) of the Control of Narcotic Substances Act, 1997.

2. Following the usual investigation, the matter was challaned and sent up before the 1st Addl. Sessions Judge/ Model Criminal Trial Court (MCTC) Special Court (CNS), Karachi Central (the "**Trial Court**"), where the Appellant came to be charged in the ensuing Special Case, bearing No. 334 of 2020, under S.9(c) of the Control of Narcotic Substances Act, 1997 on account of a contravention of Section 6 thereof, to which he pleaded not guilty and claimed trial.

3. Of the several officials said to have comprised the police party, the Prosecution examined only the Complainant (PW-1) and one of the Mashirs to the arrest and recovery, namely PC Abdul Rasool (PW-3), with the former producing various documents including the FIR, Memo of Arrest and Seizure attested copy of the Roznamcha entry reflecting the departure of the police team on the given day, and the Report as to the Inspection of the Scene of Incident. PW-2, ASI Raja Shakeel produced the Register containing the Malkhana Entry, whereas the Investigation Officer, who was the fourth and final witness, inter-alia produced his letter dated 21.05.2020 sending the quantity of charas to the Chemical Examiner and the Report dated 09.09.2020 forthcoming in that regard.

4. Based on the depositions of those witnesses and the evidence produced by them, the Trial Court arrived at the conclusion that the prosecution had successfully proven the charge against the Appellant, with a finding of guilt accordingly being recorded against him in terms of the judgment rendered in the aforementioned Special Case on 26.11.2020 (the "**Impugned Judgment**"), and he being sentenced under section 265-H(ii)Cr.P.C to suffer Rigorous Imprisonment for 4 years and 6 months and to pay fine Rs.20,000/- (Rupees Twenty Thousands Only) and in default thereof to suffer Simple Imprisonment for 5 months more, with the benefit of Section 382-B extended. Being aggrieved, the Appellant has preferred the instant Criminal Appeal.

5. Learned counsel for the Appellant assailed the Impugned Judgment, contending that the so-called facts narrated in the FIR were a fabrication, designed to falsely implicate the Appellant, and that the evidence produced by the prosecution was so marred with inconsistencies as to leave no scope for the Trial Court to have recorded a conviction.

6. Conversely, the learned APG defended the Impugned Judgment, arguing that the entire quantity recovered had been sent for analysis to the Chemical Examiner and the Report forthcoming from that quarter established that the substance was charas, hence the guilt of the Appellant had been established and his conviction ought to be sustained.

7. Having considered the matter in light of the record, what immediately strikes a chord as a point of concern is that the charge against the Appellant was that of possession of 1025 grams of charas, which is the quantity specified by the prosecution witness in their depositions and what is reflected in the Memo of Arrest and Seizure as well as the FIR, the Malkhana Entry placed on record, and is also the quantity shown to have been sent to the Chemical Examiner on 21.05.2020. However, in the Report dated 09.09.2020 issued by the Chemical Examiner, the gross weight of the slab of charas is specified as being 1075 grams, and the net weight is stated to be 1071 grams, which in both cases is disparate from the quantity otherwise reflected in the official record. The Head of the Malkhana was also not examined by the prosecution. Needless to say, the contradiction/deviation in the weight of the quantity of charas casts significant doubt on whether the slab sent for analysis to the Chemical Examiner was in fact recovered from the Appellant, particularly when viewed in conjunction with the fact that the only persons who were witness to the arrest were those shown to be members of the very police party that was instrumental in that regard, and no private persons were inducted for such purpose albeit the police party ostensibly having had advance information through a tip received from a confidential informant and the arrest shown to have taken place in broad daylight, at 12.30 p.m.

8. Indeed, in an analogous case from the standpoint of the discrepancy in weight reported as Abdul Waqar v. The State 2018 YLR 2358, a learned Division Bench held that such ambiguity served to cast significant doubt on the prosecutions' case, with the relevant excerpt from the judgment reading as follows:

> "16. Another important aspect of the matter is that as per FIR and mashirnama of recovery, the weight of recovered charas was 2500 grams, but as per report of chemical examiner the gross weight of charas was 2554 grams. At this juncture, the prosecution has failed to justify how the weight of charas was increased by 54 grams, either it was weight of plastic shopper or weight of something else. This ambiguity too made the case of the prosecution highly doubtful."

9. As such, with a pall of doubt thus enshrouding the sanctity of the chain of custody, the Report of the Chemical Examiner is stripped of probative value, as held by the Honourable Supreme Court in the cases reported as The State through Regional Director ANF v. Imam Bakhsh and others 2018 SCMR 2039, as well as a more recent Judgment in Criminal Appeal No.184 of 2020, titled Mst. Sakina Ramzan v. The State, where it was enunciated that:

> "The chain of custody or safe custody and safe transmission of narcotic drug begins with seizure of the narcotic drug by the law enforcement officer, followed by separation of the representative samples of the seized narcotic drug, storage of the representative samples and the narcotic drug with the law enforcement agency and then dispatch of the representative samples of the narcotic drugs to the office of the chemical examiner for examination and testing. This chain of custody must be safe and secure. This is because, the Report of the Chemical Examiner enjoys critical importance under CNSA and the chain of custody ensures that correct representative samples reach the office of the Chemical Examiner. Any break or gap in the chain of custody i.e., in the safe custody or safe transmission of the narcotic drug or its representative samples makes the Report of the Chemical Examiner unsafe and unreliable for justifying conviction of the accused. The prosecution, therefore, has to establish that the chain of custody has been unbroken and is safe, secure and indisputable in order to be able to place reliance on the Report of the Chemical Examiner."

10. Under the given circumstances, the doubt thus created is further compounded by the absence of private persons serving as witnesses to the arrest and seizure, with the judgment of a learned Division Bench in the case reported as Murad Ali v. The State addressing this aspect, as follows:

> "10. Admittedly, the police had prior information of the alleged incident that the present appellant along with absconding accused was coming on motorcycle having narcotics in their possession but despite of that they did not bother to collect any private person to witness the incident. The exclusion of section 103 of the Code by section 25 of the Act is not meant to completely absolve the police from asking for private mashirs to witness a recovery process therefore, whenever an attempt to associate private mashirs is not likely to result in escape of the accused the same be not avoided."

11. It also has to be borne in mind that the Complainant stated in his Examination-in-Chief that he arrested the Appellant "on pointation of spy", however replied contrarily under cross-examination that the spy had tipped him off via telephone when he was at Haji Mureed Goth and that he reached at the place of incident within 10 minutes from receiving such information. However, his testimony is silent as to how the spy then came to accompany the police party. The other relevant prosecution witness, namely PC Abdul Rasool, also did not state during his Examination-in-Chief that any spy information had been received, and conceded under cross-examination that his testimony was bereft of such mention. Furthermore, whilst the Investigation Officer of the case mentioned that another narcotics case had been registered against the Appellant, he conceded that no prior conviction record had been produced.

12. It is for these reasons that we had determined upon culmination of the hearing on 28.06.2021 that the Impugned Judgment could not sustain, hence had made a short Order in open Court whereby the Appeal was allowed, with the Appellant being acquitted of the charge and the conviction and sentence awarded to him being set aside.

JUDGE

Karachi JUDGE
Dated _____