

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Jail Appeal No.506 of 2021

Present:

Mr. Justice Mohammad Karim Khan Agha

Mr. Justice Zulfiqar Ali Sangi

Appellant	Muhammad Shafi S/o Faizullah M/s. Rashid Khan & Shaikh Ikram Aziz, Advocates
Respondent	The State through Mr. Ali Haider Saleem, Additional Prosecutor General Sindh.
Date of Hearing	09.09.2022
Date of Judgment	15.09.2022.

JUDGMENT

ZULFIQAR ALI SANGI, J.— Being aggrieved and dissatisfied with the judgment dated 07.08.2021 passed by Model Criminal Trial Court/1st Additional District & Sessions Judge, Malir Karachi in Sessions Case No.172/2021 under FIR No.970/2020 for the offence punishable under Section 6/9-C CNS Act at PS SITE Super Highway whereby the appellant was convicted and sentenced to suffer R.I. for life and fine of Rs.1 million and in case of non-payment of fine, he shall undergo S.I. for six months more the appellant has filed this appeal against his conviction. However, the benefit of Section 382-B Cr.P.C. was given to the appellant.

2. The facts of the prosecution case as per FIR are that on 15.12.2020 at about 0930 hours at service road Super Highway near 5-Star CNG Scheme No.33 a police party headed by SIP Sikander Ali Soomro of PS SSHIA apprehended the accused namely Muhammad Shafi and recovered from his possession one plastic sack from the Rickshaw he was driving and found 25 packets of Cannabis (Chars) of different size wrapped with yellow coloured solution tape total weight

30 kilo and 900 grams in presence of mashirs, hence the instant FIR was registered.

3. After usual investigation, the case was challaned and the accused was sent-up to face the trial where he pleaded not guilty to the charge.

4. The prosecution in order to prove its case examined 03 Prosecution Witnesses and exhibited various documents and other items. The statement of accused was recorded under Section 342 Cr.P.C in which he denied the allegations levelled against him and claimed false implication by the police. However, the appellant did not give evidence on oath nor produce any DWs in support of his defence.

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 dated 07.08.2021 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 contended that the appellant is innocent and has falsely been implicated in this case; that the prosecution has miserably failed to prove huge quantity of narcotics allegedly recovered from the appellant; that no private person of the locality has been made as witness which prima facie creates serious doubts on the alleged recovery; that the appellant is a first time offender having no previous criminal history. He lastly prayed that the impugned judgment may be set aside and the appellant may be acquitted of the charge. He has placed reliance on the cases of (1) Ziaul Rehman vs. The State (2001 SCMR 1405), (2) Nazeer Ahmed vs. The State (PLD 2009 Karachi 1914), (3) Ali Hassan vs. The State (PLD 2001 Karachi 369) and (4) Ahsan Marfani vs. The State (2022 YLR Note 5).

8. On the other hand, learned Addl. P.G. Sindh fully supported the impugned judgment on the basis of evidence produced by the prosecution. He has also placed reliance on the cases of (1) State through Director ANF Peshawar vs. Fakhar Zaman (2019 SCMR 1122), (2) Ibrar Ullah vs. The State (2021 SCMR 128) and (3) Mushtaq Ahmad vs. The State and another (2020 SCMR 474).

9. We have heard the learned counsel for the appellant as well as Learned Addl. P.G., Sindh and perused the material available on record.

10. Before discussing the other legal points raised by the learned counsel for the appellant we have considered the evidence of the prosecution witnesses with the assistance of learned counsel for the appellant and the learned prosecutor and found major contradictions in their evidence. Viz **(a)** The complainant Sikander Ali PW-1 in his examination-in-chief deposed that the memo was prepared by Munshi Ziaullah on his dictation that was called from police station. The mashir PW-2 Ajaz Ali in whose presence the memo was papered who also signed the same as a witness in his cross-examination stated that SIP Sikander Ali prepared the memo inside police mobile cabin on which he signed as a witness. **(b)** The complainant PW-1 during his cross-examination stated that no private witness was available at the place of incident therefore he made police officials as witnesses. The mashir/witness PW-2 has deposed against this fact and stated during cross-examination that "It is incorrect that complainant did not try to associate any private person, further says he called private persons but people did not cooperate." **(c)** It is the case of prosecution that entire recovered contraband was sealed at the spot and no samples were separated from any of the slabs, it is also admitted by the witnesses in their evidence but when we carefully examined the letter dated: Nil issued for sending the contraband for chemical examination addressed to the incharge chemical examiner Sindh it reflects that at serial No.4 sealed sample is also mentioned to be sent for chemical examination which creates very serious doubt in the prosecution case.

11. The above-noted contradictions clearly indicate that the complainant and mashir were not the true eye-witnesses of the incident and no such incident of arrest of accused and recovery of charas from the possession of appellant had occurred as alleged by

the prosecution. Taking notice of the contradictions in the evidence of the complainant and mashir, we are clear in our mind that the prosecution failed to prove its case against the appellant beyond shadow of reasonable doubt and the recovery has not been satisfactorily proved. Both the witnesses contradicted each other on material aspects of the case. No implicit reliance can be placed in view of aforesaid contradictions on the evidence of prosecution witnesses. Reliance is placed on the case of ***Muhammad Akram v. The State (2009 SCMR 230)***, wherein Hon'ble Supreme Court of Pakistan has held as under:-

"It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

12. It is observed that mere heinousness of the charge and recovery of huge quantity of the alleged contraband is no ground to convict accused. The prosecution is under a bounden responsibility to drive home the charge by proving each limb of its case that essentially included production of the witness, tasked with the responsibility of transmitting the samples to the office of Chemical Examiner. Failure is devastatingly appalling with unredeemable consequences that cast away the entire case. In the case in hand the property was sent to the Chemical Analyzer through letter dated: Nil by PW-3 Inspector Manzoor Ali the investigation officer who took the property from police station to chemical examiner which is silent and even the report of chemical examiner is silent in this regard. Only it is mentioned that the property received through letter of Inspector Manzoor Ali, presumption can be drawn that the prosecution failed to produce that witness who brought the property/contraband for chemical examination and its failure cut the chain of evidence to prove the case against the appellant in terms of safe custody especially as no malkhana entry was produced or head of the malkhana examined. In other words the prosecution has not proved the safe transmission of the property to the chemical examiner which creates serious doubt in

its case. The complainant handed over the contraband to the investigation officer on 15-12-2020 and the same was sent for chemical examination on 16-12-2020 but where it was for such a period the prosecution has failed to explain. Thus the prosecution has also failed to prove safe custody of the contraband. In this regards Honourable Supreme Court in case of **Mst. Razia Sultana V. The State and another (2019 SCMR 1300)**, has held as under:-

2. At the very outset, we have noticed that the sample of the narcotic drugs was dispatched to the Government Analyst for chemical examination on 27.2.2006 through one Imtiaz Hussain, an officer of ANF but the said officer was not produced to prove safe transmission of the drug from the Police to the chemical examiner. The chain of custody stands compromised as a result it would be unsafe to rely on the report of the chemical examiner. This Court has held time and again that in case the chain of custody is broken, the Report of the chemical examiner loses reliability making it unsafe to support conviction. Reliance is placed on State v. Imam Bakhsh 2018 SCMR 2039).

3. For the above reasons the prosecution has failed to establish the charge against the appellant beyond reasonable doubt, hence the conviction and sentence of the appellant is set aside and this appeal is allowed, setting the appellant at liberty unless required in any other case.

13. In another case of **Zahir Shah alias Shat V. The State through Advocate General, Khyber Pakhtunkhwa (2019 SCMR 2004)**, Honourable Supreme Court has held as under:-

2. We have reappraised the evidence with the able assistance of learned counsel for the parties and have noticed at the very outset that the Police constable, bearing No.FC-688, who delivered the sealed parcel to the Forensic Science Laboratory, Peshawar on 27.2.2013 was not produced by the prosecution. This fact has been conceded by the learned law officer appearing on behalf of the respondents. This court has repeatedly held that safe custody and safe transmission of the drug from the spot of recovery till its receipt by the Narcotics Testing Laboratory must be satisfactorily established. This chain of custody is fundamental as the report of the Government Analyst is the main evidence for the purpose of conviction. The prosecution must establish that chain of custody was unbroken, unsuspecting, safe and secure. Any break in the chain of custody i.e., safe custody or safe transmission impairs and vitiates the conclusiveness and reliability of the Report of the Government Analyst, thus, rendering it incapable of sustaining conviction. Reliance is placed on State v. Imam Bakhsh (2018 SCMR 2039).

14. Recently the Honourable Supreme Court of Pakistan in the case of Qaiser and Muhammad Zareef Bhatti in J.P No 587 of

2016 and CrI. S.M.R.P No. 447 of 2022 vide order dated 02-06-2022 has observed that “In absence of establishing the safe custody and safe transmission, the element of tempering 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 Substances (Government Analysts) Rules 2001 (Rules 20011, rests upon the report of the analyst. It is prosecutions 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 the 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 three members benches of this court i.e. Ikramulah v. The State (2015 SCMR 1002), The State v. Imam Bakhsh (2018 S'CMR 2039), Abdul Ghani v. The State (2019 SCMR 608), Kamran Shah v. 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 through 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).”

15. After the reassessment of material available in the file we have found that in the present case there are also a number of legal infirmities/lacunas, which have created serious doubt in the prosecution case. It is settled principle of law that for extending benefit of doubt, it is not necessary that there should be multiple circumstances creating doubt. If a single circumstance, which creates reasonable doubt in a prudent mind

about the guilt of accused, then he will be entitled to such benefit not as a matter of grace and concession, but as a matter of right, as has been held in the case of **Tariq Pervez v. The State reported as (1995 SCMR 1345)**, wherein the Hon'ble Supreme Court has held as under:-

"The concept of benefit of doubt to an accused person is deep-rooted in our country for giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right".

16. Thus based on the particular facts and the circumstances of the present case and by relying on the above precedents of the Apex Courts, we are of the view that the prosecution has failed to prove the case against the appellant beyond a reasonable doubt by producing reliable, trustworthy and confidence inspiring evidence. Therefore, we allow the instant appeal, set-aside the impugned judgment dated 07-08-2021, passed by the learned Model Criminal Trial Court/ 1st Additional District and Session Judge, Malir, Karachi in Session Case No. 172 of 2021 arising out of FIR No.970 of 2020, P.S Site Supper Highway for offence under section 6/9 (c) CNS Act, 1997, and acquit the appellant Muhammad Shafi s/o Faizullah from the charges by extending him the benefit of the doubt. He shall be released forthwith if not required in any other custody case.

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

JUDGE

JUDGE