

IN THE HIGH COURT OF SINDH, SUKKUR BENCH, SUKKUR

Spl. Cr. Jail Appeal No.D-07 of 2020

Appellant: Lal Bux S/o Shafi Muhammad
Brohi through M/s. Mehfooz
Ahmed Awan and Farhan Ali
Shaikh, Advocates

State: Through Mr. Aftab Ahmed
Shar, Addl. PG

Date of hearing: 13.06.2023

Date of decision: 22.06.2023

J U D G M E N T

JAWAD A. SARWANA, J.: Based on secret information, on 11.10.2019, the Excise Inspector at EPS, Sukkur, Najeeb-Ur-Rahman ("PW-1"), arrested the appellant, Lal Bux Brohi, at the Excise Check Point near the Sukkur Toll Plaza. The appellant was operating a motor vehicle. He was found to possess 30 slabs of charas (each slab weighing 500 kg) (Total of 15 kg). The charas, recovered from the appellant, was allegedly hidden inside the spare tyre in the car boot. Mashirs, Nazir Ahmed ("PW-2") and Syed Akhlaq Shah diligently sealed the crime property into a white plastic gummy bag. They prepared and duly signed the Memo of Seizure ("Ex.4/B"), took the appellant to the Police Station, put him in the lock-up, deposited the crime property in the Malkhana/Warehouse at the P.S., and lodged FIR No.5/2019 for an offence u/s 9(c) of the Control of Narcotics Substance ("CNS") Act, 1997 ("Ex.4/C"). The samples were sent to the Chemical Examiner and tested positive ("Ex.4/E"). The appellant, in his Statement, recorded u/s 342 Cr.P.C., denied the allegations by pleading innocence. He contended that he was framed. He was about to get married by free will to one Samina, and her uncle threatened dire consequences if the appellant proceeded with his plans to marry her. When the appellant received a threatening call from Najeeb-ur-Rahman ("PW-1"), he filed a Complaint on 25.09.2019 to the DIGP Hyderabad. The appellant appeared as a witness u/s 340(2) Cr.P.C. to prove his defence. He produced a copy of the complaint he lodged and duly acknowledged by the DIGP Hyderabad ("Ex.7/A"). Samina also stepped into the witness box as a defence witness

and, in support of the appellant's stance, testified that she would marry the accused of her free will but for his arrest. After an uneventful trial, the trial Court convicted the appellant for an offence punishable u/s 9(c) of the CNS Act, 1997 and sentenced him to life imprisonment and a fine of Rs.100,000. If he did not pay the fine, he would have to spend another year in prison. The appellant was aggrieved by the trial court's judgment and filed this Special Criminal Jail Appeal No.7/2020 to set aside his conviction and sentence.

2. Learned counsel for the appellant has primarily argued that the chain of safe custody was broken and that, in line with several judgments of the Supreme Court of Pakistan, safe custody of narcotics could not safely be established. The learned APG reluctantly agreed that the safe custody of the crime property perhaps was compromised if one considers the principles enunciated by the Supreme Court. We have heard the learned counsels, and our observations and findings are as follows:

3. The record reflects that the charas ostensibly seized from the appellant was deposited at the Malkhana/Warehouse on 11.10.2019. It was also sent for chemical analysis on the same day. The investigating officer of the case testified at trial that "*On the same date I put the property in the Maalkhana. . .Property was sent for analysis the same day*". The Chemical Examiner's Report, however, paints a different story. The Report shows that the samples sent by the P.S. on 11.10.2019 reached the Office of the Chemical Examiner, Chemical Laboratory Sukkur at Rohri on 15.10.2019 ("Ex.4/E").

4. The record of the case does not disclose the identity of the Maalkhana In Charge of the Excise Police Station to whom Najeeb-Ur-Rahman ("PW-1") handed over safe custody of the recovered substance. Needless to say that the Maalkhana In Charge was not examined at trial. Further, according to the record, the person who took the crime property for analysis, i.e., Syed Akhlaq Shah, was not examined at trial. There also appears to be no road certificate of Syed Akhlaq Shah authorising him to carry the sample from the P.S. to the Chemical Examiner. Even further, there is no explanation of where and in whose custody the narcotics were in the four days between being taken from the Maalkhana and deposited with the Chemical Analyst.

5. The Supreme Court of Pakistan has repeatedly held that the chain of safe custody is vital and one of the fundamental ingredients to establish a conviction of the accused under the CNS Act, 1997. In **Qaiser and another v. The State (2022 SCMR 1641)**, it was observed by the Court 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 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 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. Ikramullah 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 7 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), Gulzar v. The State (2021 SCMR 380).”

6. In this particular case, massive doubt regarding the safe custody of the crime property was created with the Maalkhana In Charge and the person who took the narcotics from the Maalkhana to the Chemical Analyst not being examined at trial as well as a four-day inexplicable delay in the property being picked up from the Maalkhana and in it reaching the Chemical Laboratory. Even no certified copy of the Maalkhana Register No.

XIX was produced at trial to prima facie show that the narcotics were deposited in the Maalkhana in the first place. Safe custody not being proved, it would be unsafe to convict, keeping the principles enunciated by the Supreme Court of Pakistan.

7. Given the above, the appeal is allowed, and the appellant is acquitted of the charge. He may be released forthwith if not required in any other custody case.

JUDGE

JUDGE