IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Special Criminal Jail Appeal No. D-15 of 2023

Present:-
Yousuf Ali Sayeed &
Zulfiqar Ali Sangi, JJ

Appellants	:	(1) Arshad Ali, and (2) Asif Ali, through Rukhsar Ahmed Junejo, Advocate.
Respondent	:	The State through Zulfiqar Ali Jatoi, APG
Date of hearing	:	29.11.2023

JUDGMENT

YOUSUF ALI SAYEED, J. - The Appellants have impugned the Judgment rendered on 13.03.2023 by the Additional Sessions Judge-III/MCTC-II/Special Judge (CNS), Sukkur, in Special Case No. 68 of 2018, whereby they were found guilty of an offence under Section 6 of the Control of Narcotic Substances Act, 1997 (the "**CNSA**"), punishable under Section 9(c) thereof, and were sentenced to suffer imprisonment for life and to pay a fine of Rs.100,000/- each, failing which to suffer imprisonment for one year, with the benefit of Section 382-B Cr. PC being extended.

2. Per the prosecution, the Appellants were apprehended while plying a trailer truck bearing Registration No. C-2592 on the National Highway on 06.05.2018, which was stopped and searched at about 4:30 AM at an Excise Check Post at Rohri near Gulf Hotel by a party of excise officials deployed from DIO Camp Sukkur. The exercise was shown to have yielded a cache of 25 slabs of charas, weighing 1 kg each. A half kg sample is said to have been carved from each slab and separately wrapped in white paper for onward

transmission to the Chemical Examiner, with the remaining case property being sealed and a Memo as to the arrest and seizure being prepared on the spot by Excise Inspector Muhammad Yaqoob Jagirani (the "**Complainant**"), who had led the search party, in the presence of two Mashirs, namely E.I. Rasheed Ahmed and E.C. Hazoor Bux. A First Information Report, bearing Crime Number 9 of 2018, was then registered in the matter by the Complainant under Section 9(c) of the CNSA at P.S. Excise DIO Camp Sukkur at 8:15 AM the same day.

3. Following the usual investigation, the matter was challaned and sent up before the trial Court, where the Appellants came to be charged in the aforementioned Special Case, to which they pleaded not guilty and claimed trial.

4. Of the several officials said to have comprised the excise team, the Prosecution examined only the Complainant (PW-1) and one of the Mashirs to the arrest and recovery, namely E.I. Rasheed Ahmed (PW-2), with the former producing the Roznamcha entries reflecting the departure and arrival of the excise team from and to their camp on the given day, the Memo of Search, Recovery and Arrest, the FIR, the entry regarding depositing of the case property in the Makhana, and the report of the chemical examiner, as Exhibits 6/A to 6/E respectively.

5. Based on the depositions of the two witnesses and the evidence produced by them, the trial Court arrived at the conclusion that the prosecution had successfully proven the charge against both the Appellants, with a finding of guilt accordingly being recorded against them in terms of the impugned Judgment.

6. Learned counsel for the Appellants assailed the Impugned Judgment, contending that the so-called facts narrated by the prosecution were rife with discrepancies and that the evidence produced was insufficient for the trial Court to have recorded a conviction, with the prosecution having failed to satisfactorily establish the purported recovery, as well as safe custody and transmission of the alleged samples to the office of the Chemical Examiner. He submitted that the case of the prosecution was thus marred by gaps and defects and there was no scope for a conviction under such circumstances.

7. Conversely, the learned APG defended the Impugned Judgment, albeit with little conviction or enthusiasm, relying entirely on the Report of the Chemical Examiner to contend that as the samples received were found to be charas, that of itself served to establish the guilt of the Appellants so as to prove the charge against them, hence their conviction ought to be sustained.

8. Having considered the matter in light of the record, we have observed that whilst the two prosecution witnesses furnished their testimony as to the interception of the Vehicle and the investigative steps taken thereafter, the same appears far-fetched in certain respects and is contradictory in others, whereas, more fundamentally, the chain of custody also remains shrouded in uncertainty due to gaps between the alleged recovery and the time that the samples were sent to the Chemical Examiner.

9. Indeed, from a reading of the depositions of the prosecution witnesses and an examination of the documents produced by them, the following points merit consideration:

(a) Whilst the police party left their station at about 10 PM on 05.05.2018 and are said to have taken a mere 25 minutes to reach the Excise Post where the arrest was shown to have been made at 4:30 AM the next morning, leaving a period of over 6 hours, it was stated by both witnesses that they had not checked any vehicle prior to the time that they stopped the Appellants, by happenstance it seems, as there is no mention of any tip received from an informant. Furthermore, albeit the Vehicle said to have been laden with charas under the mere cover of a tarpaulin, the Appellants are stated to have brought the same to a halt virtually at the feet of the Complainant on the mere signal from his torch, all of which beggars' belief;

(b) Incongruously, no documents or papers that may be associated with a road journey (i.e. driving licenses, fuel receipts, toll. Tickets, or restaurant bills fuel bills) were recovered;

(c) The currency notes said to have been recovered from the Appellants on their personal search were not inventoried, sealed or produced;

(d) There is a glaring discrepancy between the testimony of the prosecution witnesses on the subject of the co-option of private persons to witness the search, seizure and arrest, in as much as the Complainant stated the place of incident was a. busy road and the policy party had asked passers-by to serve as witnesses, but they had refused, and had also called upon persons from the nearby Gulf restaurant to perform such a function, but they too had refused, whereas E.I. Rasheed Ahmed deposed that no such effort or attempt was made.

(e) While samples are said to have been separated from each of the twenty-five slabs of charas, and each sample wrapped in white paper and then sealed, the vessel in which they were sealed (i.e. bag, cloth, etc.) has not been disclosed. Furthermore, the Chemical Examiner's Report discrepantly shows each of the white paper packets received to have contained a black brown piece wrapped in plastic, whereas such plastic wrapping does not find any mention in the Memo of Search, Recovery and Arrest or the depositions of the witnesses;

(f) Last but not least, turning to the chain of custody, whilst the Complainant (PW-1) stated that the case property was deposited in the Malkhana on the day of arrest and produced an entry on that score, he went on to say that the samples were sent to the Chemical Examiner the same day (i.e. 06.05.2018), without any narration as to who the task was entrusted to or any explanation as to how the samples were retrieved from the Malkhana and by whom. However, the report of the Chemical Examiner reflects that the samples were delivered through EC Hazoor Bux, but he was not called upon to depose in the matter to demonstrate the sanctity of the chain of custody. Furthermore, the report states that the samples were received on 07.05.2018, which gives rise to the question as to where the same were kept during the intervening period and raises some doubt as to the integrity of the chain.

10. When confronted with the aforementioned lapses and discrepancies, the learned APG sought to argue that they at best presented minor contradictions and inconsistencies which were not material in the final analysis, and sought to rely on the judgment of the Supreme Court in the case reported as Zain Ali v. The State 2023 SCMR1669 to bolster that argument.

11. However, we are off to view that the aforesaid judgement is completely distinguishable on the facts, as the omissions, contradictions and discrepancies at hand cannot be dispelled as minor. On the country, in our view, taken conjunctively, the same are material and cumulatively serve to raise reasonable doubt as to the credibility of the prosecution witnesses, the factum of search, seizure and arrest, and the veracity of the prosecutions overall case.

12. Needless to say, the chain of custody is a matter of pivotal importance, and its sanctity is absolutely imperative for the Chemical Examiner's Report to have any real probative value. We are fortified in this regard by a long line of caselaw emanating from the Supreme Court, including the judgments in the cases reported as The State through Regional Director ANF v. Imam Bakhsh and others 2018 SCMR 2039, Zahir Shah alias Shat v. The State through Advocate General, Khyber Pakhtunkhwa 2019 SCMR 2004, and Mst. Sakina Ramzan v. The State 2021 SCMR 451.

13. Indeed, it is pertinent to observe that it was held by the Supreme Court in the case of *Zahir Shah* (Supra) on that subject as follows:

> 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, unsuspicious, 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. In the case of *Sakina Ramzan* (Supra), while restating the principle laid down in *Imam Bakhsh*, the Court observed in the same vein 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."

15. In the matter at hand, it is apparent that the prosecution has failed to satisfactorily discharge the burden of proof so as to drive home the charge against the Appellants, having been unable to establish the necessary links of the chain and demonstrate that after the alleged recovery, the substance so recovered was kept in safe custody and safely transmitted to the office of the Chemical Examiner without being tampered with or replaced while in transit.

16. It is well settled in criminal jurisprudence that so much as a single circumstance that creates reasonable doubt in a prudent mind as to the guilt of an accused entitles him to the benefit of such doubt, not as a matter of grace and concession but as a matter of right, and if any authority is required in that regard, one need look no further than the Judgments in the cases reported as Muhammad Akram v. The State 2009 SCMR 230 and Tariq Pervez, v. The State 1995 SCMR 1345.

17. In view of the foregoing, the Appeal is allowed, with the impugned Judgment being reversed and the Appellants being acquitted of the charge, the conviction and sentence awarded to them in the underlying case being set aside, and it being ordered that they be released forthwith, unless required in connection with any other custody case.

JUDGE

JUDGE

Sukkur.
Dated: