IN THE HIGH COURT OF SINDH, CIRCUIT COURT,
LARKANA

Crl. Appeal No. D- 30 of 2022.

Present:

Mr. Justice Muhammad Saleem Jessar.
Mr. Justice Khadim Hussain Soomro.

Muhammad Rafique alias
Laloo Chandio. ……...Appellant.

Versus

The State. …….…Respondent.

Mr. Ahmed Bux Abro, Advocate for appellant.
Mr. Ali Anwar Kandhro, Additional Prosecutor General.

Date of hearing: 13.12.2023.
Date of judgment/ short order: 13.12.2023.
Date of reasons: 19.12.2023.

Judgment

Khadim Hussain Soomro, J: Through instant appeal, appellant Muhammad Rafique alias Lalu, son of Wazir Ali, has impugned the judgment dated 10.08.2022, passed by learned 1st Additional Sessions Judge, Kamber, in Sessions Case No. 135 of 2020, Re; State v. Muhammad Rafique alias Lalu, arisen out of F.I.R No.40 of 2022 of P.S Nasirabad, under Section 9 (c) of Control of Narcotic Substances Act, 1997, whereby he was convicted under Section 9 (c) of Control of Narcotic Substances Act, 1997, and sentenced to suffer R.I for ten years and to pay fine of Rs.15000/- and default in payment of fine to suffer further S.I for one month. However, the appellant has been extended the benefit of Section 382-B Cr.P.C.

2. The facts of prosecution case are that on 29-03-2022, at 0630 hours the complainant SIP Munawar Ali Lahori along with his subordinates was on patrolling vide entry No.34. During patrolling they received spy information about presence of a person having plastic shopper containing charas near Channar Graveyard on Nasirabad-Wagan road. As such, the police party proceeded to pointed place and reached at 0630 hours; saw a person, who on seeing police party tried to escape, as such police party stopped their vehicle; got down and then apprehended the accused; taken shopper in their possession; enquired his name;

then opened the shopper which was found containing charas and on weighing it become 03 kilograms; then the police party also took further body search of the accused and recovered currency note of Rs.100, thereafter the samples were separated from the recovered charas and sealed separately and then the mashirnama of arrest and recovery was prepared. Ultimately, the accused along with case property was brought at Police station, where complainant lodged F.I.R on behalf of the State to the above effect.

3. The learned trial Court framed the charge against appellant at Ex.03, to which he pleaded not guilty and claimed to be tried. Then, in order to prove the charge against the appellant, the prosecution examined PW-1 complainant SIP Munawar Ali Lahori at Ex.5, who produced the departure and arrival entries of roznamcha; mashirnama of arrest and recovery of charas; copy of F.I.R; chemical report and R.C No.143, dated 31.3.2022. PW/ mashir P.C Nizakat Ali was examined at Ex.6. Thereafter on application file under Section 540 Cr.P.C P.C Muhammad Saleem was examined at Ex.8. Thereafter, learned Prosecutor closed the side of prosecution vide statement Ex.9.

4. The statement of the appellant/ accused was recorded under Section 342 Cr.P.C at Ex.10, in which he denied the allegations of the prosecution leveled against him. He claimed his innocence and false implication in this case by police. However, he did not examine himself on oath, nor led any evidence in his defence.

5. After hearing the counsel for the parties, the trial Court convicted and sentenced the appellant as mentioned in the paragraph No.1 of this judgment.

6. Learned counsel for the appellant mainly argued that the judgment passed by the trial Court is against the law, facts and equity and liable to be set aside; that the trial Court has failed to appreciate the factual as well as legal aspects of the case while convicting the appellant. He next argued that the evidence adduced by the prosecution at the trial consisted of only police officials, who were not properly assessed and evaluated by the trial Court, and the evidence is insufficient to warrant the conviction of the appellant. Per learned counsel, there is a delay in sending the alleged samples to the Chemical Examiner; therefore, tampering with the same cannot be ruled out. It is further contended by the learned counsel that the trial Court has erred in concluding that the alleged recovery was effected from the accused in the mode and fashion described by the prosecution and that there are some important and vital contradictions in the evidence of the prosecution

witnesses, which create doubt. Lastly, he has prayed for setting aside the impugned judgment and acquittal of the appellant.

7. Learned Addl. P.G. opposed the grant of appeal on the ground that the prosecution had fully established its case by producing trustworthy ocular as well as circumstantial and documentary evidence and that no malafide or ill will was alleged or proved against the prosecution for false implication of the appellant.

8. We have considered above contentions of the learned counsel for the appellant and learned Addl. P.G., and have gone through the entire evidence very carefully.

9. The complainant and PW/ Mashir have affirmed this fact in their statements that on 29-03-2022, at 0630 hours the incident happened. The contents of F.I.R and mashirnama show that the police party reached at the spot at 0630 hours and saw a person, who on seeing police party tried to escape, as such police party stopped their vehicle, got down and then apprehended the accused; taken shopper in their possession; enquired his name; then opened the shopper which was found containing charas, which was then got weighed; then they also took further body search of the accused and recovered currency note of Rs.100; thereafter the samples were separated from the recovered charas and sealed separately and thereafter the mashirnama of arrest and recovery was prepared. ***Definitely***, all this process must had taken sufficient time, but the mashirnama shows time of its preparation, to be the same time, i.e. 0630 hours.

10. The learned counsel for appellant has placed on record certified true copies of memo of Crl. Misc. Appln. No. 428 of 2022, which reveals that on 25-03-2023, the mother of the appellant, namely Mst. Ajeeba, filed Crl. Misc. Appln. No 428 of 2022, before the Session Judge Kamber under section 491 Cr.PC, and in pursuance of said application, the raid was conducted upon P.S Kamber City through Civil Judge Judicial Magistrate Mr. Ayaz Ali Awan, but the raid was unsuccessful. Whereas according to evidence of complainant SIP Munawar Ali, the appellant was shown to be arrested on 29-03-2023, the discrepancy in the arrest date raises questions about the accuracy and reliability of the information presented by the prosecution, which creates doubt upon the prosecution story.

11. The careful re-appraisal of the material brought on the record entails that no doubt the complainant and his witnesses have tried to support the case. Still, their

evidence, when scrutinized deeply, was found to be coupled with material contradictions, improbabilities/ infirmities, and irregularities with respect to very crucial and vital points. The complainant, in his cross-examination, stated that he had sent recovered parcels to the Chemical Laboratory Rohri on 30.3.2022; while the Chemical Report shows receipt of samples as of 05.04.2022, during this period where the charas was kept for custody, the entire prosecution evidence is silent in this regard, therefore we carefully conclude that the safe custody and safe transmission of the contraband material was compromised. Moreover, as per the contents of mashirnama and F.I.R, the charas was in the shape of "Pattis", and out of each "Patti", 200 grams totaling 600 grams, were separated for analysis, meaning thereby there were in all three "Pattis". However, when the case property was de-sealed in the Court at the time of examination of the prosecution witnesses, it was found in eight pieces and not in three pieces/ slab. In legal proceedings, such discrepancies can be crucial, as they create a very serious doubt about the credibility of the evidence presented by the prosecution.

12. These glaring contradictions in the evidence of two prosecution witnesses prove that the evidence brought on record by the prosecution against the appellant is not trustworthy and inspires confidence, and it cannot be relied upon and cannot be made the basis for awarding a sentence. Not only this, but it also proves that the entire case is cooked up at the police station and proves the case of prosecution as doubtful. Perusal of the above-referenced evidence shows that both the witnesses are not on the same or on one line with each other on material points, which creates doubt regarding the authenticity of the prosecution evidence.

13. The record further reveals that the alleged recovery was effected on 29.03.2022. It was sent to the Laboratory through P.C Muhammad Saleem on 05.04.2022, with a delay of more than six days, and such delay has not been explained. It has also not been brought on record that it was in the safe custody of the Investigating officer of the case, and there was no chance of tampering. There is an absence of documentation indicating that during the above period, the contraband material was under the safe custody of the investigating officer overseeing the case, thereby establishing the absence of any opportunity for unauthorized alterations. Though P.C Muhammad Saleem, who had taken the sample to the Chemical Examiner, has been examined, he has also not deposed any single word with regard to its keeping throughout the intervening period of six days. As per Rule 4(2) of the Control of Narcotic Substances (Government

Analysis) Rules, 2001, this exercise was required to be completed within seventy-two hours of the recovery, and for this purpose, even there is no plausible explanation brought on record by the prosecution as to why such inordinate delay was caused in the completion of this exercise by the investigating officer. This is also fatal to the prosecution. In this regard, reference can be made to the case of *Muhammad Aslam v. The State* reported in **2011 SCMR 820 (Supreme Court of Pakistan**).

14. Moreover, the WHC/ Moharar of the Malkhana was not even called in the witness box to testify whether he held the sample parcels in safe custody there from 29.03.2022 to 05.04.2022 during this period; it is unclear who had possession of the sample. It is the prosecution's responsibility to establish each and every step, starting with the stage of recovery and continuing through the creation of sample packets, safekeeping of sample parcels, and secure transportation of sample parcels to the relevant laboratory. The prosecution must prove this linkage, and if any links are absent in similar acts, the accused must have received the benefit of the doubt. As a result, the prosecution failed to prove that the sample parcels were handled carefully and sent securely. This flaw on the side of the prosecution is enough to give the appellant the benefit of the doubt. I have been guided by the case of ***JAVED IQBAL V/S THE STATE (2023 SCMR 139)*****,** the relevant portion of the judgment is reproduced as under:-

> *"We have heard the learned counsel for the appellant, learned Additional A.G. KP, perused the record and observed that in this case, the recovery was effected on 18.12.2013 and the sample parcels were received in the office of chemical examiner on 20.12.2013 by one FC No.1007 but the said constable was never produced before the Court. Even the Moharrar of the Malkhana was also not produced even to say that he kept the sample parcels in the Malkhana in safe custody from 18.12.2013 to 20.12.2013. It is also shrouded in mystery as to where and in whose custody the sample parcel remained. So the safe custody and safe transmission of the sample parcels was not established by the prosecution and this defect on the part of the prosecution by itself is sufficient to extend benefit of doubt to the appellant. It is to be noted that in the cases of 9(c) of CNSA, it is duty of the prosecution to establish each and every step from the stage of recovery, making of sample parcels, safe custody of sample parcels and safe transmission of the sample parcels to the concerned laboratory. This chain has to be established by the prosecution and if any link is missing in such like offences the benefit must have been extended to the accused."*

15. A similar law point has been discussed and observed by the Supreme Court of Pakistan in the cases of Qaisar Khan Vs. The State through Advocate General, Khyber Pakhtunkhwa, Peshawar (2021 SCMR-363), The State through Regional Director ANF Vs. Imam Bakhsh and others (2018 SCMR-2039), Ikramullah and

others Vs. The State (2015 SCMR-1002) and Amjad Ali Vs. The State (2012 SCMR-577). In the cases cited above, the Honourable Supreme Court of Pakistan determined that in a case containing the defect mentioned above on the part of the prosecution, it cannot be said with any degree of certainty that the prosecution has established its case against the accused beyond a reasonable doubt.

16. In the case of Mst. Razia Sultana v. The State and another (2019 SCMR 1300), the Supreme Court observed following:-

> *"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. 10. 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:- 6 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, 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). 11. Recently the Honourable Supreme Court of Pakistan in the case of Qaiser and another v. The State (2022 SCMR 1641), 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."

17. In a recent case, Qaiser and others v. The State (2022 SCMR 1641), the Supreme Court of Pakistan, in the paragraph No. 4 of the judgment said as under:-

"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."

18. All these facts and circumstances prove that the entire case was cooked up at the police station, and these facts establish the case of the prosecution as highly doubtful. As such, in the presence of these irregularities and recklessness, mere evidence of police witnesses cannot be relied upon and cannot be made the basis for awarding a sentence.

19. After reassessing the evidence presented by the prosecution, which, as discussed above, is based on material contradictions, improbabilities/ infirmities and irregularities with respect to very crucial and vital points, we conclude that the prosecution has not proven its case against the appellant beyond a reasonable doubt and that multiple circumstances creating doubt are not required to extend the benefit of the doubt. If a single circumstance raises a reasonable doubt in the mind of a prudent person about the guilt of the accused, the accused 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 Honourable Supreme Court of Pakistan held as follows:

"*The concept of benefit of doubt to an accused person is deep-rooted in our country for giving him If there is a situation that raises reasonable doubt in the opinion of a wise person regarding the accused's guilt, the accused will be entitled to the benefit not as a matter of grace and concession, but as a matter of right."The State (1998 SCMR 1345) and Ayub Masih v. The State (PLD 2002 SC 1048)." The exact same reasoning was reiterated in the case of Abdul Jabbar v. State (2019 SCMR 129) when the apex court held that once a single loophole is*

observed in a case presented by the prosecution, such as a discrepancy between the ocular account and medical evidence or the presence of doubtful eyewitnesses, the benefit of such loophole or lacuna in the prosecution's case automatically goes in favour of an accused."

20. This is an established principle of law and equity that it is better that 100 guilty persons should let off but one innocent person should not suffer. As the distinguished English jurist William Blackstone wrote, "Better that ten guilty persons escape than that one innocent suffer." Benjamin Franklin, who was one of the foremost figures of early American history, says "It is better a hundred guilty persons should escape than one innocent person should suffer."

21. It is also a well-established principle of criminal administration of justice that no conviction may be handed to an accused unless and until the prosecution presents credible, trustworthy, and unimpeachable evidence with no contradiction throwing doubt on the validity of the prosecution account. In the current instance, we believe that the prosecution's account is surrounded by dense mists of doubt and that the learned trial Court did not examine the evidence in its real context, arriving at an incorrect result by finding the appellant guilty of the charge. As a result, and for the foregoing reasons, the conviction and sentence awarded by the learned trial Court against the appellant is not sustainable. Consequently, the appeal was allowed by a short order dated 13.12.2023, whereby the appellant Muhammad Rafique alias Lalu was acquitted of the charge, and these are the reasons for the above-mentioned short order.

Judge

Judge

Ansari