

In the High court of Sindh, Circuit Court Larkana

BEFORE:

Mr. Justice Omer Sial,
Mr. Justice Khalid Hussain Shahani

Cr. Appeal No.D-50 of 2024

Appellants: Abdul Wali Achakzai Pathan s/o Wali Muhammad,
Through Messrs Asif Ali Abdul Razak Soomro and Abdul Baqi Jan Kakar, Advocates.

State: Through Mr. Asif Hussain Chandio, Law Officer of Customs.

Cr. Appeal No.D-51 of 2024

Appellants: Abid Noor s/o Muhammad Ibrahim Brohi and Naeem s/o Muhammad Bux Badeni Brohi
Through Mr. Mehboob Ali, Advocate.

State: Through Mr. Asif Hussain Chandio, Law Officer of Customs.

Date of hearing: 13-02-2025

Date of order: -02-2025

J U D G M E N T

Khalid Hussain Shahani, J. Appellants Abdul Wali, Abid Noor and Naeem were convicted for offence u/s 9(c) of the Control of Narcotics Substance Act, 1997 by the learned 1st Additional Sessions Judge/Special Judge CNS Jacobabad; they were sentenced to imprisonment for life and fine of Rs.200,000/- (two lacs). They would have to remain in jail for another six months, if they not pay the fine, with benefit of section 382-B Cr.P.C.

02. The facts that led the registration of the case are, on 06-03-2020 at about 06:00 a.m on a spy tip, Inspector Muhammad Abid of Customs found accused Abid Noor and Naeem transporting 330 K.Gs Chars, concealed in a tank of Hino Truck; besides them, FIR was registered against Mullah Abdul Majeed, to whom the Chars was alleged to be delivered and Abdul Wali, said to be the owner of truck.

03. Initially, a formal charge was framed against accused Abid Noor and Naeem; however, accused Abdul Wali during trial after seeking bail joined the trial, whereby amended charge was framed, to which they pleaded "not guilty".

04. To substantiate its case, the prosecution examined Inspector Abid Hussain (the complainant), Constable Wazeer Ali (mashir of arrest and seizer) and Inspector Manzoor Ahmed (the investigating officer).

05. At the outset, learned counsel for the appellants submitted that safe custody and safe transmission from time of seizer till its deposit at the chemical laboratory was not proved at trial. Learned counsel drawn our attention to admitted fact that after seizer at Jacobabad, the property was re-sealed at the Customs Office Sukkur. It was next contended that In-charge of warehouse , who kept the property for two days, has not been examined to prove, it remained in safe custody. The Prosecutor General reluctantly agreed that safe custody as directed by the Supreme Court, was not proved.

06. The complainant Abid Hussain testified at trial deposed, after arrest and seizer, he brought the case property duly sealed from Jacobabad to Customs Office Sukkur, showed the sample parcels to his superiors after de-sealing the same, whereby those samples were separated as per their brands. Such alone fact draws inference of tempering with the case property. Glance on record reflects that the case property was deposited by the investigating officer at chemical laboratory, Karachi with delay of two days i.e on 09-03-2020. Neither Inspector Hashim Ali, the In-charge of warehouse was examined, nor form 22.70 of Register No.XIX, required under Police Rules, 1934 produced, to suggest its safe custody and safe transmission for chemical analysis. The complainant further testified the memo of arrest and seizer being backbone of the case was authored by clerk Ishfaque. Admittedly, he too has not been examined. Besides, contradictory statement has been furnished by the constable Wazeer Ali (mashir of arrest and seizer) that such memo was prepared by complainant himself.

07. Record further reveals that no incriminating evidence has been brought on the record against appellant Abdul Wali, except mere version to be owner of Hino truck; however, such fact has categorically been denied by him in his statement u/s 342 Cr.P.C.

08. In numerous judgments, the august Supreme Court considering the facts referred hereinabove held, if safe custody and transmission of seized narcotics are not proved at trial, its benefit is accorded to the accused.

09. In the case of Zahir Shah V. The state (2019 SCMR 2004), it was observed:

"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 the 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 Analysis, thus rendering it incapable of sustaining conviction”.

10. In the case of Javed Iqbal V. The State (2023 SCMR 139), it was held:

“So the safe custody and safe transmission of the sample parcel was not established by the prosecution and this defect on the part of prosecution by itself is sufficient to extent benefit of doubt to the Appellant. It is to be noted that in the cases of 9(c) of NSA, it is the duty of prosecution to establish each and every step from the stage of recovery, making sample parcels, safe custody of sample parcel and safe transmission of sample parcel 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. Reliance in this behalf can be made upon the cases of Qaiser Khan V. the State through Advocate General, Khyber Pakhtunkhwa, Peshawar (2021 SCMR 363), Mst. Razia Sultana V. The State and another (2019 SCMR 1300), the State through Regional Director ANF V. Imam Buksh and Others (2018 SCMR 2039), Ikramullah and other V. the State (2015 SCMR 1002) and Amjad Ali V. the State (2012 SCMR 577), wherein it was held that in a case containing the above mentioned defects on the part of the prosecution it cannot be held with any degree of certainty that the prosecution had succeeded in establishing its case against the accused person beyond any reasonable doubt. So the prosecution has failed to prove the case against the petitioner and his conviction is not sustainable in view of the above mentioned defects”.

11. In the case of Asif Ali & another V. The State (2024 SCMR 1408), it was observed:

“In the cases under CNSA, 1997 it was the 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 sample parcels to the concerned laboratory. This chain has to be established by the prosecution and if any link is missing, the benefit of the same has to be extended to the accused”.

12. In the case of Muhammad Hazir V. The State (2023 SCMR 986), it was observed:

“After hearing the learned counsel for the appellant as well as the learned State counsel and perusing the available record alongwith the impugned judgment with their assistance, it has been observed by us that neither the safe custody nor the safe transmission of sealed sample parcels to the concerned Forensic Science Laboratory was established by the prosecution because neither the Muharar nor the constable Shah Said (FC-2391) who deposited the sample parcel in the concerned laboratory was produced. It is also a circumstance that recovery was affected on 10-02-2015 whereas the sample parcels were received in the said laboroty on 13-02-

2015 and prosecution is silent as to where remained these sample parcels during this period, meaning thereby that the element of tempering with is quite apparent in the case. This court in the cases of Qaiser Khan V. The State through Advocate General, Khyber Pakhtunkhwa, Peshawar (2021 SCMR 363), Mst. Razia Sultana V. The State and another (2019 SCMR 1300) The State through Regional Director ANF V. Imam Baksh and others (2018 SCMR 2039), Ikramullah and others V. the State (2015 SCMR 1002) and Amjad Ali V. The State (2012 SCMR 577) has held that in a case containing the above mentioned defects on the part of prosecution it cannot be held with any degree of certainty that prosecution has succeeded in establishing its case against accused person beyond any reasonable doubt”.

13. In the case of Qaiser Khan V. The State (2021 SCMR 363), the Supreme Court held:

“The Forensic Report reflects that the alleged narcotics were received in the laboratory on 11 December, 2012 but evidence on record is silent that where the same remained for two days i.e from 9th December, 2012 to 11th December, 2012. Similarly evidence regarding safe transmission of alleged recovered narcotics to the laboratory for chemical analysis is also missing. The law in this regard is settled by now that if safe custody of narcotics and its transmission through safe hands is not established on the record, same cannot be used against the accused. Reliance in this regard can well be placed on the cases of Mst. Razia Sultana V. The state and another (2019 SCMR 1300) and State through Regional Director, ANF V. Imam Buksh and others (2018 SCMR 2039)”.

14. In the light of dictum laid down by the Honorable Supreme Court and observing that in the present case, neither warehouse In-charge, nor the author of arrest and seizer memo examined, nor form 22.70 of Register No.19 of Police Rules, 1934 produced, and thus, safe custody and safe transmission were not proved. Conviction, therefore, cannot be sustained. Consequent upon, the appeals are allowed, and the appellants are acquitted of the charge. They may be released forthwith, if not required in other custody case.

JUDGE

JUDGE