

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT
HYDERABAD**

Criminal Jail Appeal No.D-43 of 2024

Before:

Mr. Justice Arshad Hussain Khan.

Mr. Justice Dr. Syed Fiaz ul Hassan Shah.

Appellant: Ayaz Ali son of Ali Bux Talpur,
Through Mr. Abdullah, advocate.

The State: Ms. Safa Hisbani, A.P.G

Date of hearing: 20.05.2025

Date of decision: 20.05.2025

JUDGMENT

Dr.Syed Fiaz ul Hassan Shah, J: Through instant appeal, the appellant has challenged the judgment dated 18.05.2024, passed by learned Model Criminal Trial Court-I/Special Judge Control of Narcotics Substance Act, Hyderabad, in Special Case No.44 of 2024, Re: State vs. Ayaz Ali , U/ss 9(1), 3(b) CNS, Act PS Fort, Hyderabad, whereby the learned trial court after full-dressed trial convicted and sentenced the appellant R.I for five years and to pay fine of Rs.40,000/, in case of default of making payment of fine he will suffer further simple imprisonment for three months. Benefit of Section 382-B Cr.P.C was also extended to the appellant.

2. The facts in brief necessary for disposal of instant Criminal Appeal are that on 26.02.2024 at 2100 hours, the accused was arrested by the police party of PS Fort, Hyderabad headed by SIP Muhammad Kashan Khanzada during area patrolling upon spy information at Railway Rest House, near Railway Dikka, Hyderabad while he was found possessing 590 grams chars. The complainant/P.W-1

prepared such memo of arrest and recovery at Exh.3/B and brought the accused and case property at PS and registered such FIR.

3. The investigation was entrusted to SIP Mubashir Ali (PW-3). After completing usual investigation, investigating officer submitted challan against accused showing him in custody.
4. Copies were supplied vide, such receipt was taken at Ex.01. A formal charge was framed on accused at Ex.02, to which present accused did not plead guilty and claimed to be tried vide plea recorded at Ex.02/A.
5. In order to substantiate the charge against the accused, prosecution has examined witnesses P.W-1 complainant SIP Muhammad Kashan Khanzada at Exh.3. He produced roznamcha entries, memo of arrest and recovery and FIR at Exh.3/A to Exh.3/D respectively. P.W-2 mashir PC Muhammad Faisal at Exh.4. He produced memo of site inspection, roznamcha entries at Exh.4/A to Exh.4/C respectively. P.W-3 SIP Mubashir Ali at Exh.5. He produced roznamcha entries, letter to SDPO, letter to chemical examiner, sample receipt, CRO of the accused and chemical examiner report at Exh.5/A to Exh.5/G respectively. P.W-4 WHC Khanwand Bux at Exh.6. He produced malkhana entry No.11 of register No. 19. Learned APG for the state closed the side of prosecution at Exh.7. After closing the side of prosecution evidence, statement under section 342 Cr.P.C. of accused was recorded at Exh.8, in which he denied all the allegations leveled against him by the prosecution and claimed to be innocent. However, he neither examined himself on oath as his own witness nor produced any witness in his defense.

6. Learned counsel for the appellant argued that the appellant/accused is innocent and has falsely been implicated in this case. He further argued that nothing was recovered from the possession of the appellant/accused and alleged recovery has been foisted upon the present accused. He further argued that no private witnesses have been associated as mashir in this case; therefore, there is violation of section 103 Cr.P.C. He further argued that there are several contradictions, lacunas, and legal infirmities in the evidence of prosecution witnesses but the learned trial Court did not consider the same hence, he prayed for justice.
7. Learned A.P.G for the State has submitted that the accused was arrested on the spot with recovery of 590 grams chars. Section 103 Cr.P.C is not applicable in cases of recovery of narcotics. She further argued that prosecution has produced CRO of the accused at Exh.5/F which shows that the accused is habitual offender who is selling narcotics and wine (desi sharab). All the prosecution witnesses have supported the case and produced all the relevant record; therefore, appeal may be dismissed.
8. We have considered the above arguments and perused the record.
9. The appellant has impugned the Judgment of conviction dated 18.05.2024. We have carefully examined the deposition of PW-3 SIP Mubashir Ali, who deposed that ***“On 27.02.2024, I was posted as SIP at PS Fort, Hyderabad. On the same date, I received the mashirnama of arrest and recovery, copy of FIR, case property parcel and accused custody from SIP Muhammad Kashan Khanzada for further investigation. I kept the case property parcel in the malkhana of PS through WHC Khawand Bux.”*** We have noticed that such assertion on oath has been matched with

the contents of the FIR at Exh.3/D and an endorsement under the writing of Investigation Officer at column-5 of said FIR is clearly visible ***“received FIR today i.e. 27.02.2024 Sd/-”***. Therefore, it has safely established that the Investigation Officer was appointed on 27.02.2024 at 11:00 A.M. as deposed by the said Investigation Officer himself and confirmed through the contents of FIR at Exh.3/D.

10. Upon a **comparative examination** of the evidence provided by **PW-4 Khawand Bux**, who served as the Malkhana Incharge at the relevant time, he deposed that ***“On 26.02.2024, I was posted as WHC at PS Fort, Hyderabad. On the same date I received sealed parcel of case property weighing about 590 grams chars and four currency notes of Rs.100/= each of crime No.16/2024 under section 9 (1) 3. (b) CNSA from I.O SIP Mubashir Ali for keeping the same in the malkhana for safe custody. I kept the case property parcel in the malkhana of PS vide malkhana entry No.11 of register No.19”***.
11. The testimony of **PW-4** stands in stark contradiction to the testimony of **PW-3**, the Investigation Officer of the case. It is perplexing how **PW-4**, the Malkhana Incharge, could have received the **case property** on **26.02.2024**, when the Investigation Officer, SIP Mubashir Ali, **was only** appointed on **27.02.2024**. This discrepancy raises serious concerns regarding the chain of custody and the handling of evidence. The inconsistency in testimonies not only undermines the credibility of the record but also calls into question the procedural integrity of the investigation and prosecution.

12. The blatant and conspicuous contradictions in the evidence lead to the **definitive conclusion** that the principles of safe custody **and** secure transmission of the case property were severely compromised. This raises serious concerns regarding mandatory procedural compliance, necessitating closer scrutiny by the Prosecution, which bears the burden of providing infallible and trustworthy **proof** that no lapses or irregularities occurred in the management and handling of the case property.
13. Furthermore, there exists a **significant interval—exceeding 24 hours**—between the commission of the offence, its sealing, the registration of the FIR, and the handover of the case property to the Investigation Officer. The Prosecution has failed to offer any justification or a valid and plausible explanation regarding the **custody and security** of the case property during this intervening period. The absence of a clear and convincing account raises doubts about the integrity of the **chain of custody**, warranting judicial consensus that the prosecution has failed to prove the case against the Applicant.
14. The **Prosecution** has failed to present any **documentary proof** establishing that, on **26.02.2024**, the **case property** was handed over to the **Investigation Officer**, despite the fact that he had not yet been **appointed to the case**. This glaring procedural lapse raises serious concerns regarding the integrity of the **chain of custody** and the proper handling of evidence.
15. Furthermore, the Prosecution has not provided firm, trustworthy and inspiring **evidence** proving that the **case property** was recovered by **SIP Muhammad Kashan Khanzada**. This deficiency is further reinforced by the testimony of **PW-1**, who has himself deposed on

record, contradicting the Prosecution's assertions. He deposed that

“ I conducted personal search of the apprehended I person and found one black colour shopper from his fold of his shalwar. I opened and checked the black colour shopper and found one large and one small piece of chars in it. I weighed the pieces of chars on electronic scale which came of 590 grams. I also secured four currency notes of Rs.100/= each total Rs.400/= from side pocket of his shirt. The case property was sealed with black colour shopper in white cloth bag for chemical examination. I prepared such memo of arrest and recovery. Thereafter we brought the accused and case property at PS where registered FIR No.16/2024 under section 9 (1) 3 (b) CNSA against accused and I also kept my arrival entry in the roznamcha register”.

The absence of a **clear documentary trail** undermines the reliability of the **evidentiary process**, warranting further judicial scrutiny and active view that the prosecution has further failed to give firm, reliable and trustworthy evidence and proof that the case property was recovered by SIP Muhammad Kashan Khanzada. As per prosecution case, the PW-1 SIP has recovered and sealed the case property and thereafter the same was brought at P.S and an FIR Exh.3/D was registered on 26.02.2024 at 2200 hours and whereas PW-3 SIP Mubashir Ali was appointed Investigation Officer on 27.02.2024 at 11:00 a.m. The **Prosecution** has not provided any **explanation or documentary proof** regarding the **whereabouts and custody** of the **case property** between **26.02.2024 at 2200 hours** and **27.02.2024 at 11:00 a.m.** This intervening period remains **unaccounted for**,

raising concerns about **possible lapses in safe custody** and the integrity of the **chain of custody**.

16. The absence of a **clear record** of where the **case property** was stored and who had control over it during this period **undermines its evidentiary value**. It is apparent that the **Prosecution** has **failed** to establish that proper safeguards were in place to ensure the **security and integrity** of the case property. The PW-4 has produced Exh.6/A entry No.11 dated 26.02.2024 of Register No.XIX, without date which has been kept by SIP Muhammad Kashan Khanzada and shows that the case property recovered from accused Ayaz Ali was handed over to WHC Khawand Bux and SIP Sher Ali. The PW-4 Khanwand Bux has deposed contrary to record of Entry No.11 of Register No.XIX that he has received case property from SIP Mubashir Ali/ Investigation Officer and whereas prosecution has failed to produce SIP Sher Ali even his name is not appearing in the calendar of witnesses which also create sufficient doubt that led this Court to form opinion that in case SIP Sher Ali is appeared he would not confirm that the case property was existing or handed over to him as per the contents of Register No.XIX.

17. The prosecution has failed to prove safe custody of property due to overt contradiction in the statement of the Raiding Officer PW-1 and report of Chemical examiner and even the procedure to record the date, time and purpose of taking out and taking in the case property has also not been followed as prescribed in the above-mentioned laws. We are mindful that conviction can be awarded to an Accused or maintained by this Court on the basis of direct oral evidence of only one eye-witness if same is reliable, trustworthy and confidence-inspiring as has been held by the Supreme Court of

Pakistan in cases reported ***“Muhammad Ehsan vs. The State” (2006 SCMR 1857) and “Niaz-Ud-Din v. The State” (2011 SCMR 725)***. However, the Hon’ble Supreme Court has greatly emphasized in narcotics cases reported as ***“Ikramullah Vs. The State” (2015 SCMR 1002) “Amjad Ali Vs. The State” (2012 SCMR 577), “Haji Nawaz Vs. The State” (2020 SCMR 687) and “Qaiser Khan Vs. The State” (2021 SCMR 363)*** that safe custody or safe transmission of the Narcotics to be considered and focused carefully and if it is not substantiated or based on unpersuasive evidence, the Report of Government Analyst becomes doubtful and unreliable.

18. The prosecution is under mandatory duty to prove its case not only beyond reasonable doubt but also lays with burden of proof of safe-custody and safe-transmission of case property under Article 117 of the Qanun-e-Shahadat Order, 1984. The Supreme Court of Pakistan held in cases ***“Javed Iqbal v. The State” (2023 SCMR 139); “Mst. Sakina Ramzan v. The State” (2021 SCMR 451) and “Qaiser Khan v. The State” (2021 SCMR 363)*** that the chain of events—series of things linked, connected or associated together, would have to demonstrate and prove by the prosecution and if any link is missing or division occur, the benefit would go in favor of the accused.
19. Any anomaly or defect in investigation may usually led to draw a negative inference reckon definite reason of either unskillfulness—capacity building—or malafides. The Police Rules, 1934 impose comprehensive duty and burden to the Investigation Officer for seizure, recovery of case property and its safe handling and production before the Court whilst linchpin supervisor of

investigation with further responsibility of legal scrutiny by the prosecutor. The guidance can be taken from the dictum laid down by Hon'ble Supreme Court of Pakistan in case “**Ahmed Ali & another vs. The State**” (2023 SCMR 781). The relevant portion is re-produced:

“The Rule 22.16 of the Police Rules, 1934

(“The Police Rules”) deals with the —case property.

Sub-rule (1) thereof provides, inter alia, that in certain circumstances, police shall seize weapons, articles and property in connection with criminal cases, and take charge of property which is unclaimed.

Sub-rule (2) thereof provides, inter alia, that each weapon, article or property (not being cattle) seized under the above sub-rule shall be marked or labelled with the name of the person from whom, or the place where, it was seized, and reference to the case diary or other report submitted from the police station. If articles are made up into a parcel, the parcel shall be secured with sealing wax, bearing the seal impression of the responsible officer, and shall similarly be marked or labelled. Such articles or parcels shall be placed in safe custody, pending disposal as provided by law or rule.

Sub-rule (3) thereof provides, inter alia, that the police shall send to headquarters or to magisterial outposts all weapons, articles and property connected with cases sent for trial, as well as suspicious, unclaimed and other property, when ordered to do so by a competent Magistrate. Sub-rule (4) thereof provides, inter alia, that motor vehicles detained or seized by the police in connection with cases or accidents shall be produced before a Magistrate after rapid investigation or by means of in-complete challan.

Rule 22.18 of the Police Rules deals with —custody of property.

Thus, under the Police Rules and the High Court Rules, mentioned above, in all cases, especially in the cases of articles sent to the chemical examiner, it is necessary that there be no doubt as to what person or persons have had charge of such articles throughout various stages of the inquiry. Besides, the person who packed, sealed, and dispatched such articles should invariably be examined. Further, the clothes, weapons, money, ornaments, food and every other article that forms a part of the circumstantial evidence has to be produced in court, and their connection with the case and identity should be proved by witnesses.”

20. The Hon’ble Supreme Court in the case **“Ahmed Ali & another case (*supra*)** held that:

“Thus, the Police Rules mandate that case property be kept in the Malkhana and that the entry of the same be recorded in Register No. XIX of the said police station. It is the duty of the police and prosecution to establish that the case property was kept in safe custody, and if it was required to be sent to any laboratory for analysis, to further establish its safe transmission and that the same was also recorded in the relevant register, including the road certificate, etc. The procedure in the Police Rules ensures that the case property, when is produced before the court, remains in safe custody and is not tempered with until that time. **A complete mechanism is provided in Police Rules qua safe custody and safe transmission of case property to concerned laboratory and then to trial Court.**”

21. It is mandatory for the Prosecution to undergo two tests for —case property. Firstly, to recover, seize, present in charge sheet or challan and to establish safe custody by preparation of documents flawless in description, accuracy, deposit in safe custody with proper status and secondly, safe transmission of it under proper documents from safe custody to Chemical Lab and from Chemical laboratory to the Police and production before the Court as an admissible evidence. Any violation of it would lead to draw a negative inference that led basis for acquittal of an accused. Reliance can be placed on the cases ***“Qaiser and another v. The State” (2022 SCMR 1641); “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 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).***
22. We hold that impugned Judgment of Conviction based on unpersuasive evidence of broken safe custody and safe transmission of the case property that causing miscarriage of justice. In conclusion, we refer about the doctrine of benefit of doubt. The rule of benefit of doubt is essentially the rule of prudence which cannot be ignored while dispensing justice. The steadily commandment of law necessitate unremitting attention for conviction that it must be based on un-impeachable evidence and

certainty of guilt and where any doubt emerges would indispensably favor the Accused. The Hon'ble Supreme Court of Pakistan has ruled down in several cases that it does not need to be a plethora of circumstances raising doubt—a single event that creates reasonable doubt in the mind of a prudent person regarding an accused's guilt would entitle him acquittal as a matter of right and not as clemency or grace. Reliance can be placed on “*Tariq Pervez v. The State*”, (1995 SCMR 1345), “*Riaz Masih alias Mithoo v. The State*”, (1995 SCMR 1730), “*Muhammad Akram v. The State*”, (2009 SCMR 230), “*Hashim Qasim and another v. The State*”, (2017 SCMR 986), “*Ikramullah Vs. The State*”, (2015 SCMR 1002), “*The STATE through Regional Director ANF V. IMAM BAKHSH and others* (2018 SCMR 2039)”, and “*KHAIR-UL-BASHAR V. The STATE*”, (2019 SCMR 930).

23. Consequently, looking to the inexcusable and untrustworthy evidence adduced by the prosecution coupled with broken safe custody and failure to discharge legal burden as envisage under Article 117 as well as burden of proof as envisaged under Article 121 of the Qanun-e-Shahadat Order, 1984, the instant appeal is **allowed**. In sum up, the impugned Judgment of conviction dated 18-05-2024 passed by the learned Model Criminal Trial Court-I/Special Judge Control of Narcotics Substance Act, Hyderabad in Special Case No.44 of 2024 is **set aside** and the Appellant is acquitted from the charge.

24. He is ordered to be released from the custody forthwith if he is not required in any other custody case/crime.

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