

HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Appeal No.D-120 of 2017

[Dawood versus The State]

Suo Moto Revision Application No.D-01 of 2018

[The State versus Sarwan]

Before:

Mr. Justice Muhammad Karim Khan Agha
Mr. Justice Omar Sial

Appellant : Through Mr. M. Jameel Ahmed advocate
The State : Through Mr. Shawak Rathore D. P.G
Respondent-Sarwan: None present
Date of hearing : 22.05.2024
Date of Judgment : 30.05.2024

J U D G M E N T

MUHAMMAD KARIM KHAN AGHA, J.- Appellant Dawood has challenged the Judgment dated 11.11.2017 passed by the learned Special Judge for Control of Narcotics Substance Act Tando Muhammad Khan in Special Case No.11 of 2014 *Re: The State versus Dawood and another*), outcome of Crime No.22 of 2014 registered at P.S Tando Ghulam Hyder under Section 9(c) of CNS Act 1997, whereby he has been convicted and sentenced to suffer R.I for 11 years and six months and has also been directed to pay fine of Rs.55,000/- and in case of failure in payment thereof he has to suffer S.I for 08 months and 15 days more, however, benefit of Section 382-B Cr.P.C has been extended to him, whereas co-accused Sarwan has been acquitted of the charge.

2. On 17.05.2014 Complainant SIP Qamar Zaman Khoso of P.S Tando Ghulam Hyder lodged the subject FIR at about 1400 hours by stating that he is posted as SIP at P.S Tando Ghulam Hyder and on same day he alongwith his subordinate staff left the police station at 11:00 hours for patrolling duty under entry No.7; that during patrolling when they were going towards Behrani Mori via Link road and reached near Shrine of Haji Shah, they saw a grey colour

Mehran Car coming in front of them and on seeing the police party the said car suddenly stopped and one person, sitting on front seat, alighted and fled towards Dargah, the said person was identified as Sarwan S/o Abdullah Norangzado r/o Mirpur Bhathoro District Sujwal; that they reached near the car as such driver alighted from the car, who on inquiry disclosed his name as Dawood S/o Abdul Qadir alias Abban by caste Makhdoom r/o Ahsan Shah Colony, City Matli District Badin; that thereafter they conducted the search of car and under the paidan of front seat they secured chadar like ajrak having flowers of yellow colour, wherein eight slabs were wrapped in plastic of light brown colour on which photos of cup and kettle were printed and words 'green mountain coffee' were written; that said plastic was opened and found each packet containing two slabs of chars; on inquiry Dawood disclosed that said chars belongs to Sarwan Norangzado while car belongs to him and they were going to Talhar for selling the said chars; the weight of recovered chars became 8180 grams which was sealed at the spot; the personal belongings and car were also seized and accused alongwith case property were brought at P.S and subject FIR was lodged.

3. After usual investigation police submitted the challan before the trial court and after completion of necessary formalities charge was framed against the present appellant to which he pleaded not guilty and claimed trial.

4. In order to prove its case the prosecution examined two (02) witnesses, who exhibited numerous documents and other items. Then statement of appellant/accused under Section 342 Cr.P.C was recorded whereby he denied the allegations leveled against him and claimed his false implication. However, he neither examined himself on Oath nor led any evidence in his defense.

5. After completion hearing the parties and assessing the evidence on record the trial court vide earlier Judgment dated 13.11.2015 awarded conviction of 11 years to present appellant, against which he preferred Cr. Appeal No.D-109 of 2015 before this

Court and vide Judgment dated 20.03.2017 the conviction and sentence awarded to the present appellant was set aside and matter was remanded back for decision after recording statement under Section 342 Cr P.C of present appellant afresh.

6. Meanwhile co-accused Sarwan was also arrested and trial Court proceeded case of both accused jointly. Amended charge was framed against both accused, to which they pleaded not guilty and claimed trial. The prosecution examined two (02) witnesses, who exhibited numerous documents and other items. Thereafter statements of accused persons under Section 342 Cr.P.C were recorded, wherein they denied the allegations leveled against them by prosecution witnesses and claimed their false implication. However, neither they examined themselves on Oath nor led any evidence in their defense.

7. After hearing the parties and assessing the evidence on record the trial Court vide impugned Judgment dated 11.11.2017 convicted the present appellant as mentioned in opening paragraph of this judgment while acquitted the co-accused Sarwan, hence appellant has preferred this Appeal against his conviction.

8. After admission of captioned appeal for regular hearing this Court vide Order 03.01.2018 in exercise of powers under Section 439(1)(2) Cr.P.C issued show cause notice to acquitted accused/respondent Sarwan that why impugned judgment to the extent of his acquittal may not be set aside. Since both the captioned appeal and suo motu revision are outcome of same judgment, as such are being heard and decided through this common judgment.

9. Learned counsel for the appellant has contended that the appellant is completely innocent and has been falsely implicated in this case; that no narcotic was recovered from him and that the same were foisted on him from the car which he was driving; that there are material contradictions in the evidence of the witnesses which renders their evidence unreliable; that S.103 Cr.PC was violated as there was no independent mashir; that the prosecution had failed to prove safe custody and safe transmission of the narcotic from the

time it was recovered from him until the time it was taken to the chemical examiner and as such the chemical report is of no legal value and for any or all of the above reasons he be acquitted of the charge by being extended the benefit of the doubt. In support of his contentions he has placed reliance on the cases of **Riaz Mian and another vs. The State** [2014 SCMR 1165], **Muhammad Saleh alias Dubi Gadehi vs. The State** [2015 YLR 2520 Sindh] and **Shoaib Ali vs. The State** [2018 MLD 1835].

10. On the other hand learned DPG Sindh appearing on behalf of the State has fully supported the impugned judgment and since the prosecution had proved its case beyond a reasonable doubt against the appellant the appeal be dismissed. With regard to acquitted co-accused Sarwan who this court had taken suo moto notice of his acquittal and issued him notice as to why his acquittal should not be overturned. The DPG conceded that the State had not filed an appeal against his acquittal as his case was on a different footing to that of the appellant and was unable to point out any compelling reasonable as to why his acquittal should not be overturned and stated that the court had taken notice of this case in exercise of its suo moto jurisdiction.

11. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence and considered the relevant law including the case law cited at the bar.

12. At the very out set we note that in narcotic cases, one of the **most crucial** aspects of the case is that the prosecution must prove safe custody of the narcotic from the time of its recovery until the time when it is sent for chemical examination. If they fail to do so then there is a possibility that the narcotic substance had been tampered with before it was received at the chemical laboratory for its examination. In such like cases where unbroken chain of custody cannot be proved by the prosecution then the chemical report is of no legal value. It is noted that this is the view taken by the Supreme Court **regardless** of the amount of the recovered narcotic whether small or large as the principle remains the same.

13. In this case the appellant was arrested by the PW 1 Qamar Zaman who was also the IO of the case on 17.05.2014 where charas weighing 8.8kg was recovered from the car which he was driving whilst his passenger Sarwan (acquitted co-accused) made his escape good. The recovered narcotics according to the evidence of the complainant were taken to the PS however he gives no explanation where they were kept for 3 days after which he took the narcotics for chemical analysis. It is alleged that the narcotics were kept in the malkhana during this period of 3 days however the malkhana in charge Ghulam Akbar did not give evidence and register 19 was not exhibited to show the deposit of the narcotics and withdrawal of the same for chemical examination and thus the prosecution has failed to prove the safe custody of the narcotics for a 3 day period from the time when they were allegedly deposited in the malkhana to the time when the narcotics were taken from the malkhana for chemical examination and thus these narcotics might have been tampered with during this period which situation cannot be ruled out and thus the prosecution has failed to prove safe custody of the narcotics and this being the case we find that we cannot place any reliance on the chemical report.

14. With regard to the importance of the prosecution proving safe custody of the narcotic from the time of its recovery to the time it was sent for chemical analysis the same was stressed/emphasized by the Supreme Court in the case of **Qaisar V State** ((2021 SCMR 363) which held as under;

"3. We have heard the learned counsel for the petitioner as well as the learned Additional Advocate General, KPK and perused the available record alongwith the impugned judgment with their assistance and observed that in this case the prosecution has failed to establish the safe custody and safe transmission of sample parcels to the concerned laboratory. This court had laid down in many judgments that the representative samples of the alleged drug must be kept in safe custody and undergo safe transmission from the stage of recovery till its submission to the office of the Government analyst. Non establishing the said facts would caste doubt and would impair and vitiate the conclusiveness and reliability of the report of the Government analyst. Thus rendering it incapable of sustaining conviction.

4. In the present case no police official was produced before the Trial Court to report about safe custody of samples if entrusted to him for being kept in the Malkhana in safe custody. Even the police official whose belt number (FC 4225) has been mentioned by the Government analyst in his report, was not produced by the prosecution to depose regarding the safe deposit of the said sample parcels in the concerned laboratory. The record reveals that the recovery was allegedly affected on 19.08.2011 whereas, according to the report of chemical examiner, the sample parcels were received in the said office on 26.08.2011. Nobody from the prosecution side was produced to claim that during this period the said sample parcels remained intact in his possession or under his control in the Malkhana in safe custody. Even the prosecution is silent as to where remained these sample parcels from 19.08.2011 to 26.08.2011. In absence of establishing the safe custody and safe transmission, the element of tampering 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 Substance (Government Analysts) Rule 2001 (Rules 2001), rest 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 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 the three members benches of this court i.e. Ikramullah v. the State (2015 SCMR 1002), the State v. Imran Bakhsh (2018 SCMR 2039), Abdul Ghani v. the state (2019 SCMR 608), Kamran Shah vs. The State (2019 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 thr. 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) and Gulzar v. the State (2021 SCMR 380)."

15. Thus for the reasons mentioned above, since safe custody of the narcotics has not been proved which leads to the chemical report being of no evidentiary value, we find that the prosecution has not

proved its case beyond a reasonable doubt against the appellant and hence by being extended the benefit of the doubt the appellant is acquitted of the charge, the impugned judgment is set aside and the appeal is allowed. The appellant who is on bail shall have his bail bonds cancelled and surety discharged.

16. With regard to co-accused Sarwan the same considerations apply to him concerning the failure to prove safe custody of the narcotic and as such his acquittal is bound to be maintained on this ground alone. Even otherwise his case was on a completely different footing to that of the appellant in that he was not arrested on the spot, no recovery was made from him, the car was not in his name, the appellant in his S.342 Cr.PC statement denies that Sarwan was with him in the car and even otherwise there is no evidence that the complainant knew him from before and was able to identify him as the person who fled the car. Thus his acquittal is maintained and Cr. Rev.S.M is dismissed.

17. The appeal and Cr.Rev S.M stand disposed of in the above terms.