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ORDER SHEET

IN THE HIGH COURT OF SINDH,

CIRCUIT COURT, HYDERABAD.

Criminal Appeal No.S- 142 of 2018

DATE	ORDER WITH SIGNATURE OF JUDGE

10.02.2023.

Mr. Ahsan Gul Dahri, Advocate for appellants.
Ms. Sana Memon, A.P.G for State.

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Appellants are present on bail. I have heard learned counsel for the appellants and learned A.P.G. Reserved for judgment.

Tufail

Gutka : No S.342 Ques on Chemical report 234
No safe Custody

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Appeal No.S-142 of 2018

Ashraf Ali and others. . . . . .Appellants

Versus

The State. . . . . .Respondent

Appellants : Ashraf Ali, Ali Raza, Mubashir and Bilawal (on bail)	through Mr. Ahsan Gul Dahri, Advocate
Respondent : The State	through Miss Sana Memon, A.P.G, Sindh
Date of hearing	10.02.2023
Date of judgment	17.02.2023

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- This criminal appeal is directed against the judgment dated 25.06.2018, passed by the learned IInd Additional Sessions Judge, Shaheed Benazirabad, in Sessions Case No.642 of 2016, emanating from Crime No.78 of 2016, registered at Police Station A-Section Nawabshah, under sections 337-J, 188, 273, 270, 269 PPC, whereby the appellants Ashraf Ali S/o Asghar Malak, Ali Raza S/o Muhammad Bachal Mallah, Mubashir S/o Muhammad Sabir and Bilawal S/o Ghulam Muhammad have been convicted u/s 265-H(ii) Cr.P.C for preparing/selling Gutka/narcotic substances etc and sentenced to suffer RI for 01 year each.

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2. Brief facts of the prosecution case as disclosed in the FIR are that on 28.05.2016, complainant ASI Abdul Qayoom, lodged the FIR, alleging therein that on the said date he along with PC Jan Muhammad, PC Muhammad Hashim, PC Ayaz Ali, PC Sajjad Ali, PC Zahid Hussain vide Roznamcha entry No.9 at about 1030 hours left the police station for patrolling purpose. While patrolling, at about 1200 hours they reached at Café Shiraz Chowk, received spy information that four persons are present at Railway road Farooqi Chowk and selling Mainpuri Gutka etc. Upon receiving such information, complainant party reached at the pointed place and apprehended all four accused persons having plastic shoppers in their hands. Complainant made PC Jan Muhammad and PC Muhammad Hashim as mashir and in their presence inquired the names and their parentages as well as the addresses of the suspects and upon making their personal search recovered Gutka and other narcotic substances like IVA, Rajni, Mainpuri and local made Gutka. Thereafter, complainant took samples from each recovered Narcotic substances/Gutka and sealed the same for chemical examination, whereas the remaining substances were sealed separately. Complainant also recovered some currency notes from each appellant/accused, prepared such mashirnama of arrest and recovery and then brought the arrested accused and the recovered case properties at police station, where FIR was registered on behalf of the State.

3. During investigation, Investigating Officer recorded 161 Cr.P.C. statements of the PWs. Samples of the recovered substance were sent to the chemical examiner and positive chemical report was received. On the conclusion of investigation challan was submitted against the accused for offence as mentioned above.

4. Trial court framed charge against accused, to which, they pleaded not guilty and claimed to be tried. At the trial, prosecution examined 02 PWs. Statements of the accused were recorded u/s 342 Cr.P.C, wherein they denied the prosecution allegations leveled against them and claimed their false implication in this case; however, neither they examined themselves on oath nor led any evidence in defense.

5. Learned trial Judge after hearing the learned counsel for the respective parties and evaluating the evidence available on record convicted and sentenced the appellants as set out earlier in this judgment.

6. Learned trial court in the impugned judgment has already discussed the evidence in detail and there is no need to repeat the same here, so as to avoid duplication and unnecessary repetition.

7. Learned counsel for the appellants has contended that the prosecution case is highly doubtful; that it is lacking in material particulars and same is full of material contradictions and same have caused a serious dent in the prosecution case; that nothing was recovered from the appellants and alleged recovery has been foisted upon them. He next argued that the recovered substance was not kept in safe custody and as such the chemical report could not be safely relied upon and as such for any or all of the above reasons the appellants should be acquitted by extending the benefit of the doubt.

8. Learned Assistant Prosecutor General, Sindh has fully supported the impugned judgment and contended that the prosecution has fully proved its case against the appellants and that the alleged Gutka/narcotic substance was kept in safe custody from the time of its recovery until trial and it would be difficult if not impossible to foist such large amount of such Gutka/substance on the appellants and as such the appeal be dismissed.

9. I have carefully considered the arguments of the learned counsel for the parties, scanned the entire evidence available on record and reviewed the relevant case law.

10. After my reassessment of the evidence I find that the prosecution has **NOT** proved beyond a reasonable doubt the charge against the appellants keeping in view that each criminal case must be decided on its own particular facts and circumstances for the following reasons;

(a) That the chemical report was not put to the appellants during the recording of their S.342 Cr.PC statements.

It is well settled by now that any piece of incriminating evidence which is not put to the appellant for his explanation during the recording of his S.342 Cr.PC statement cannot be used to convict him. Thus, the chemical report is excluded from consideration and as such the prosecution has not been able to prove that the substance recovered from the appellants was in any way illegal. In this respect reliance, if any is needed, is placed on the case of **Haji Nawaz v The State** (2020 SCMR 687)

(b) Even otherwise, the prosecution has not been able to prove safe custody of the recovered substance from the appellants from the time of its recovery to the time when it was taken to the chemical laboratory for analysis. This is because the substance was recovered by the complainant on 28.05.2016 from the appellants and according to his evidence was placed in the Malkhana for safe keeping on the same day with Muhammed Mithal. After two days on 30.05.2016 the recovered substance was taken for chemical examination by SDPO City Nawabshah. However no malkhana entry was exhibited and the head of the malkhana Muhammed Mithal was not examined to prove the safe custody in the malkhana and as such there is no evidence where the recovered substance was kept over this two day period during which time it could have been tampered with. Even the person who allegedly took the recovered substance 2 days later from the Malkhana for chemical analysis was not examined to prove safe custody and safe transmission. As such since the safe custody and safe transmission of the substance has not been proven from the time of its recovery until the time it was sent to the chemical examiner the possibility of tampering with the substance cannot be ruled out and as such I cannot safely rely on the chemical report which based on the particular facts and circumstances of the case is also, on this count as well, not of any legal value in proving that the recovered substance was at all illegal. It is noted that in cases of safe custody the Supreme Court has held that the amount of recovery whether small or large is not relevant as the principle remains the same.In this respect reliance is placed on the case of **Qaisar V State** ((2021 SCMR 363).

11. As such for the reasons mentioned above the prosecution has failed to prove its case beyond a reasonable doubt against the appellants whose appeals are allowed and the appellants on bail shall have there bail bonds cancelled and are free to go.