

Order Sheet

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

Cr. Jail Appeal No. D- 75 of 2020

DATE

ORDER WITH SIGNATURE OF JUDGE

10.01.2023

Mr. Shahnawaz Brohi, Advocate for appellants
Mr. Shahzado Saleem Nahiyoan, Addl. P.G.

We have heard learned counsel for the appellants Javed and
Muhammad Nawaz as well as learned A.P.G. Reserve for Judgment.

karar_hussain/PS*

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

Before:

Mr. Justice Mohammad Karim Khan Agha
Justice Mrs. Kausar Sultana Hussain

Cr. Jail Appeal No.D-75 of 2020

Javed and another

Versus.

The State.

Appellants : Javed and another	Through Mr. Shahnawaz Brohi Advocate
Respondent : The State	Through Mr. Shahzad Saleem Nahiyoon, Additional Prosecutor General, Sindh
Date of hearing	10.01.2023
Date of judgment	12.01.2023

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- This criminal jail appeal is directed against the judgment dated 05.10.2020, passed by learned Sessions / Special Judge for CNS, Hyderabad, in Special Case No.249 of 2018, arising out of Crime No.127 of 2018, registered at Police Station Bhitai Nagar, Hyderabad, under section 9(c) of Control of Narcotic Substances Act, 1997, whereby the appellants have been convicted u/s 9(c) of CNS Act, 1997 and sentenced to suffer imprisonment for life and to pay the fine of Rs.200,000/- each. In case of default in payment of fine they were ordered to suffer simple imprisonment for 04 months more. Benefit of Section 382-B Cr.P.C. was also extended to the accused.

2. The brief facts of the prosecution case are that on 09.11.2018 at 2000 hours, police party headed by SIP Dili Jan of CIA Centre Hyderabad, while checking the vehicles near Filter Plant Police Check-post, Hyderabad, saw and got stopped one Toyota XLI Corolla Car bearing registration No.ASB-311, coming from the side of Hyderabad city, wherein two persons were seated, who on seeing police party tried to run away; however, due to suspicion they were apprehended. On search being conducted by police party, they secured 04 kilograms of

narcotic substance from the fold of shalwar of accused Javed as well as cash of Rs.1500/- was recovered from the side pocket of his shirt. As for co-accused Muhammad Nawaz, complainant secured 04 kilograms of Narcotic substance as well as Rs.2000/- from his side pocket of shirt. Thereafter, search of the aforementioned car was also made and further 82 kilograms of narcotic substance were found secured, wrapped in two sacks, from its trunk (dickey). Thereafter, the contraband items, as stated above, were sealed and the vehicle/car was also taken in custody. Such memo of arrest and recovery was prepared on the spot in presence of mashirs. Then accused and case property were brought at police station where F.I.R. was lodged by complainant SIP Dili Jan on behalf of the State.

3. During investigation, Investigating Officer recorded 161 Cr.P.C. statements of the PWs. Recovered narcotic substance was sent to the chemical examiner and positive chemical report of the said contraband / sample as that of Charas was received. On the conclusion of investigation challan was submitted against the accused for offence u/s 9(c) of CNS Act, 1997.

4. Trial Court framed charge against accused at Ex.3 u/s 9(c) of CNS Act, 1997, to which, accused pleaded not guilty and claimed to be tried vide their pleas at Ex.4 and 5, respectively. At the trial prosecution examined PW-1 complainant SIP Dili Jan at Ex.6, who produced attested copy of entry of departure, mashirnama of arrest and recovery, roznamcha entry of arrival at Police Station and FIR at Ex.6/A to C; PW-2 ASI / Mashir Ghulam Ali was examined at Ex.7, who produced mashirnama of vardat at Ex.7/A; PW-3 HC Dilshad Ali was examined at Ex.8, through whom the narcotic substance was sent to the Chemical Examiner for its examination and report; PW-4 I.O SIP Saif-ur-Rehman Sahto was examined at Ex.9, who produced photocopy of Register No.19 and attested copies of entries of departure, arrival and other documents under which the case was investigated at Ex.9/A to F; and, thereafter, prosecution side was closed at Ex.10.

5. Statements of accused were recorded u/s 342 Cr.P.C. at Ex.11 and 12 respectively. Accused denying prosecution allegations claimed their false implication in this case. Accused neither examined themselves on oath in disproof of the charge nor led any defense evidence.

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6. It appears that at the first instance, after conclusion of trial the case was decided by learned IInd Additional Sessions / Special Judge (CNS), Hyderabad, vide judgment dated 01.02.2020, whereby both the aforementioned accused were convicted under section 9(c) of CNS Act, 1997, and were sentenced to suffer R.I for ten years with fine of Rs.300,000/- each. The said judgment was impugned before this Court through Cr. Appeal No.D-12/2020 (re: Javed and another V. The State), which was decided vide judgment dated 06.08.2020, whereby the aforementioned impugned judgment dated 01.02.2020 was set aside and the matter was remanded to the Court of Sessions/Special Judge, Hyderabad, with directions to pass judgment strictly in accordance with law after hearing the parties within a period of two months. Thereafter, the learned Sessions / Special Judge (CNS), Hyderabad, heard the parties and after examining the evidence available on record convicted and sentenced the appellants as stated above, by way of judgment dated 05.10.2020 (impugned herein), hence this appeal.

7. Learned trial Court in the judgment dated 05.10.2020 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

8. We have carefully heard Mr. Shah Nawaz Brohi, learned advocate for appellants, Mr. Shahzad Saleem Nahiyoan, Additional Prosecutor General, Sindh and scanned the entire evidence.

9. Learned advocate for appellants has mainly contended that prosecution case is highly doubtful; that despite the place of incident was located at busy spot, yet, none from public was joined as mashir to attest the arrest and recovery; there are material contradictions in prosecution evidence, hence it cannot be relied upon; that as per prosecution case the narcotic substance was sent for Chemical analysis through HC Dilshad, which was received in the office of Chemical Examiner on 14.11.2018 with delay of 5 days which was unexplained and hence tampering with the case property during such period could not be ruled out. He further argued that the prosecution had failed to prove safe custody of the narcotic which was not even produced before the trial court and as such based on any or all of the following reasons the appellants should be acquitted of the charge by being extended the benefit of the doubt. In support of his contentions, learned counsel for the appellants relied upon the cases of **Qaiser and another V The State** (2022 SCMR 1641), **Akhtar Gul V The State** (2022 SCMR 1627),

Umar Zaman V The State (2022 SCMR 2093), **Abdul Ghani V The State** (2022 SCMR 2121), **Mir Waiz V The State** (2022 SCMR 2105), **Ghulam Nabi Shah V The State** (2020 YLR 2127), **Agha Qais V The State** (2009 P Cr. L J 1334), **Riasat Ali V The State** (2004 P Cr. L J 361), **Qaiser Khan V The State through Advocate-General, Khyber Pakhtunkhwa, Peshawar** (2021 SCMR 363) and **Imtiaz Khan and another V The State** (2020 P Cr. L J 202).

10. On the other hand learned Additional Prosecutor General Sindh appearing on behalf of the State has fully supported the impugned judgment and contended that the prosecution had proved its case beyond a reasonable doubt based on the evidence on record and as such the appeal being without merit be dismissed. In support of his contentions he placed reliance on the case of **Liaquat Ali V State** (2022 SCMR 1097)

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 outset 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 the prosecution fails 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. In this case the appellants were arrested by the police on 09.11.2018 and from each of them 4 KG's were recovered and from the boot of the car which they were allegedly driving 2 bags containing 42 and 40 KG Charas respectively was recovered. According to the complainant PW 1 Dilli Jan the case property was handed over to the duty officer at the PS whose name he did not remember and whose identity remains unknown. PW 2 Ghulam Ali who is the mashir of the memo of recovery is of no assistance in this regard as in his evidence he does not mention where the narcotics were kept or who they were given to on their return to the PS. There is a malkhana entry dated 09.11.2018 which shows that the case property

was deposited in the malkhana however the malkhana in charge WHC Munir Mangrio was not examined by the prosecution to prove safe custody and as such it may be that his evidence would not have supported the prosecution case. In any event there is no evidence that the narcotics were kept in the malkhana for 5 days without explanation before being taken to the chemical examiner by PW 3 Dilshad Ali who did not produce any entry showing that he had taken the narcotics from the malkhana to be deposited with the chemical examiner and did not even produce his departure and arrival entries to this effect.

13. Thus, based on the particular facts and circumstances of this case we find that the prosecution has **not** been able to prove safe custody of the narcotic from the time when it was recovered from the appellant till the time when the same was sent for chemical examination as it appears that the narcotic was unaccounted for five days during which time it could have been tampered with and as such we find the chemical report to be of no legal value to the prosecution in proving the recovered narcotic.

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. Even otherwise the fact that the alleged recovered narcotics were not produced in court which is an admitted position is seriously damaging, if not fatal, to the prosecution case keeping in view that they

were not burnt and it appears could not be traced. In this respect reliance is placed on the cases of **Riasat Ali** (Supra) and **Agha Qais** (Supra). We have also noted that the alleged recovery from the boot of the car was not put to either of the accused during their S.342 Cr.PC statements but only the narcotics recovered from them personally and as such the recovery of the narcotics from the boot of the car cannot be used to convict the accused in respect of that recovery. Furthermore, the car was never produced in court and no evidence was produced that the accused had any link with it. Its real owner never came forward nor was he ever traced out by the IO.

16. Thus for the reasons mentioned above and in particular the fact that the prosecution has failed to prove safe custody of the narcotic from the time when it was recovered until the time it was sent for chemical analysis and as such the possibility of the narcotic being tampered with during this period cannot be ruled out we find that the prosecution has **not** proved its case beyond a reasonable doubt against the appellants and hence by being extended the benefit of the doubt the appellants are acquitted of the charge, the impugned judgment is set aside and the appeal is allowed. The appellants shall be released forthwith unless they are wanted in any other custody case.

17. The appeals stand disposed of in the above terms.

ANNOUNCED IN OPEN COURT ON 12/01/23