# IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Spl. Cr. Appeal No. D–55 of 2023

***Before:***
***Mr. Justice Amjad Ali Bohio, J.***
***Mr. Justice Khalid Hussain Shahani, J.***

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| Appellant | : | Syed Zulfiqar Ali Shah son of Syed Paryal Shah *Through* Mr. Rukhsar Ahmed Juenjo, Advocate |
| The State | : | Mr. Muhammad Farooque Ali Jatoi, Special Prosecutor for ANF |
| Date of hearing | : | 18.11.2025 |
| Date of decision | : | 02.12.2025 |

## JUDGMENT

***KHALID HUSSAIN SHAHANI, J:—*** The present special criminal appeal has been preferred by the appellant, Syed Zulfiqar Ali Shah, calling in question the judgment dated 18.09.2023 passed by the learned 1st Additional Sessions Judge/ Special Judge (CNS), Khairpur, in Special Case No.195 of 2022, arising out of Crime No.12 of 2021 of Police Station ANF Sukkur, whereby the appellant was convicted under Section 9(c) of the Control of Narcotic Substances Act, 1997 and sentenced to suffer rigorous imprisonment for twelve years and six months, with fine of Rs.60,000/– and in default thereof to undergo simple imprisonment for a further period of nine months. Through this appeal, the appellant seeks setting aside of the said conviction and sentence, and his acquittal from the charge.

2. The prosecution case, briefly stated, is that on 06.09.2021 at about 1440 hours, a spy informer allegedly approached Police Station ANF Sukkur and conveyed to SIP Mudasir Ali Khan that the present appellant, namely Syed Zulfiqar Ali Shah, would come near UBL Bank Branch Gambat, District Khairpur, to deliver narcotic substance to his customer. Acting upon such information, a raiding party comprising eleven armed officials along with the spy informer was constituted. The party, as per prosecution version, departed from the police station at 1500 hours under *roznamcha* entry No.4 and reached the pointed place near UBL Bank Branch Gambat at about 1610 hours.

3. According to the prosecution, upon arrival of the raiding party, one person was seen standing and holding a black coloured travelling bag. The spy

informer allegedly identified him on the spot as Syed Zulfiqar Ali Shah, the present appellant. It is alleged that immediately on seeing the ANF officials, the said person started running and, while fleeing, threw the black travelling bag at the place of wardhat. It is further alleged that during his flight, a brown coloured wallet fell down from his pocket at the same spot. The police party is said to have chased him but, due to rush of people and narrow streets, the alleged person managed to escape. Some staff was left at the scene while the complainant and others made unsuccessful efforts to trace out the fleeing person.

4. The prosecution further asserts that on returning to the spot, the complainant asked nearby private persons to act as mashirs, but they allegedly refused; consequently PC Muhammad Ahmed and PC Operator Toufique-ul-Hassan, both members of the raiding party, were appointed as mashirs. The brown wallet was opened and was found to contain an original CNIC purportedly in the name of the appellant bearing number 41308-1600651-3, cash amount of Rs.500/– and some other cards. The black travelling bag was opened and allegedly contained clothes under which twenty momi–enveloped packets wrapped with yellow solution tape were found. Each packet, when a cut was made at one corner, was stated to contain *charas.* Each packet was weighed at 500 grams through an electronic scale, making a total of 10 kilograms. Serial numbers 1 to 20 were marked on the packets. From each slab, 10 grams *charas* was separated as sample, sealed in separate momi envelopes marked 1 to 20 and kept in a white cloth bag, sealed with seal "MA" as parcel No.1. The remaining bulk was sealed in a yellow plastic bag as parcel No.2. A memo of recovery was prepared on the spot, which was stated to have been signed by the complainant and the mashirs. The party returned to the police station at about 1925 hours, where entry No.7 was maintained and FIR No.12 of 2021 was lodged under Section 9(c) of CNS Act, 1997 against the present appellant. The case property was deposited in *Malkhana* under entry No.529 of Register No.19 and on the next day, i.e. 07.09.2021, sample parcel No.1 was dispatched to the Chemical Examiner Laboratory, Rohri, through

PC Muhammad Ahmed along with the requisite documents. Eventually, a positive Chemical Examiner's report was received, confirming that the samples contained *charas.*

5. It is further the prosecution case that during investigation, the complainant issued letters to SSP Khairpur for production of the criminal record of the appellant. In response, it was reported that the appellant had previously been challaned in FIR No.130 of 2016 under Section 9(a) of CNS Act and FIR No.57 of 2020 under Section 9(b) of CNS Act, both registered at P.S. Gambat. A letter was also issued to NADRA for verification of the CNIC allegedly recovered from the wallet, but, as conceded, no verification report was received. The investigation was then transferred to Inspector Muhammad Bashir Khan Pathan, who, on 03.10.2022, received instructions that the appellant had obtained interim pre-arrest bail and that his application for confirmation was fixed before the Sessions Court at Khairpur. Acting on such information, he along with staff proceeded to the Sessions Court, held *nakabandi,* and upon dismissal of interim bail, apprehended a person coming out of the main gate of the court, who disclosed his name as Syed Zulfiqar Ali Shah. From his person, an amount of Rs.300/– was recovered. It is further claimed that upon inquiry he voluntarily disclosed that on 06.09.2021 he had fled from the spot by throwing a travelling bag containing charas and that his wallet had fallen there. A memo of arrest was prepared and the accused was then lodged in lockup and ultimately sent up for trial.

6. After compliance with Section 265-C, a formal charge under Section 9(c) of the Control of Narcotic Substances Act, 1997 was framed against the appellant to which he pleaded not guilty and claimed trial.

7. In order to prove its case, the prosecution examined five witnesses. PW–1, SIP Mudasir Ali Khan, the complainant, was examined at Exh.3 and deposed in line with the FIR, reiterating the raid, the supposed identification by a spy informer, the alleged throwing of the travelling bag, the falling of the wallet, the preparation of memo of recovery, the dispatch of samples to the Chemical

Examiner, the receipt of a positive report, and the issuance of letters to SSP Khairpur and NADRA. In cross-examination, however, he candidly admitted that the appellant was not arrested at the spot along with charas; that the appellant succeeded in escaping and was not apprehended despite hectic efforts; and while stating that the travelling bag was thrown by the appellant, he did not assert that charas was recovered from the exclusive possession of the appellant. He admitted that the packets were only cut at a corner and the slabs were not opened entirely, and that he could not say what, if any, monogram or symbol was printed on them. He denied the suggestion that ANF officials had raided the house of the appellant and taken away his wallet, but the defence put this version to him in clear terms.

8. PW–2, PC Muhammad Ahmed Kambhoh, examined at Exh.4, supported the complainant with regard to the alleged raid and recovery. He stated that he, along with PC Operator Toufique-ul-Hassan, was appointed as mashir when private persons allegedly declined to act as such. He reiterated the description of the travelling bag, the 20 packets, the weighing, sampling and sealing and also stated that he took the samples to the Chemical Examiner Laboratory, Rohri. In cross-examination, he too conceded that the appellant was not arrested at the spot along with the recovered charas and further admitted that the charas exhibited in court was not recovered from the exclusive possession of the appellant. He acknowledged that private persons were asked to become mashirs but they refused, whereupon he and PC Toufique-ul-Hassan were appointed as mashirs from among official staff.

9. PW–3, ASI Ashbeel Victor, examined at Exh.5, deposed that on 03.10.2022, he, being Incharge Malkhana ANF Sukkur, received an amount of Rs.300/– allegedly recovered at the time of the arrest of the appellant, which he entered in Register No.19 under entry No.529 and kept in safe custody. No material contradiction was elicited from him in cross-examination.

10. PW–4, PC Muhammad Kamil Abbasi, examined at Exh.6, deposed regarding the arrest of the appellant on 03.10.2022 from outside the gate of

Sessions Court Khairpur. He stated that after information was received about dismissal of interim bail, strict nakabandi was maintained and at about 1400 hours one unknown person wearing blue clothes came out of the gate, who was pointed out by Inspector Abid Raza as the wanted person. He stated that he and PC Khuram Shahzad were appointed as mashirs; that upon inquiry the person disclosed his name as Zulfiqar Ali Shah; that from his body search Rs.300/– were recovered; and that upon further inquiry the person disclosed that he had previously fled from wardhat by throwing a travelling bag containing 20 packets of charas, and his wallet had fallen there. In cross-examination this witness admitted, in most categorical terms, that he had not seen the present appellant at wardhat while throwing the travelling bag in which *charas* was allegedly lying.

11. PW–5, Inspector Muhammad Bashir Khan Pathan, the subsequent investigating officer, examined at Exh.7, stated that he proceeded to Sessions Court Khairpur on directions, held nakabandi, arrested the appellant after dismissal of his interim bail, recovered Rs.300/– from his person and prepared the arrest memo. He further deposed that upon interrogation, the appellant confessed to his involvement in narcotic business and to having fled from wardhat on 06.09.2021 by throwing a travelling bag containing charas and leaving his wallet behind. He also deposed that he recorded statements of PWs, collected previous criminal record of the appellant and submitted challan in court. In cross-examination he admitted that he received information about the bail through telephone, that he could not remember who was Incharge of PS ANF Sukkur at that time, and that he arrested the appellant from outside the main gate of the Sessions Court. Suggestions put to him by the defence regarding manipulation and falsity of proceedings were denied.

12. After closure of prosecution side, the statement of the appellant under Section 342 Cr.P.C. was recorded at Exh.9. He denied the allegations and asserted that ANF officials had raided his house and forcibly taken away his wallet, which was later planted to connect him with an alleged recovery. He did not opt to examine himself on oath nor did he examine any defence witness.

13. Mr. Junejo, learned counsel for the appellant contended with considerable vehemence that the appellant has been falsely implicated and that the prosecution case is a product of fabrication. He argued that the foundation of the prosecution story is inherently weak, as the appellant was not arrested at the time and place of alleged recovery and that both the complainant and the mashir of recovery have admitted that the *charas* was not recovered from the exclusive possession of the appellant. He submitted that such admission by official prosecution witnesses fatally undermines the very charge of possession central to Section 9(c) of the CNS Act.

14. The learned counsel further argued that identification of the appellant rests entirely on the alleged pointation by an unnamed spy informer who was never produced as a witness before the trial court and whose identity, background and reliability remain wholly untested. No identification parade was conducted, although the appellant was arrested more than a year after the incident. In such circumstances, he submitted, the identification of the appellant is legally unsafe and wholly insufficient to sustain a conviction. He also urged that the non-production of the spy informer and the failure to arrange a test identification parade reflect a serious omission in investigation which creates doubt about whether the person allegedly seen at wardhat was indeed the present appellant.

15. Learned counsel also emphasized that although the place of occurrence is near UBL Bank Branch Gambat, which is a busy public area, no independent private witness was joined in the recovery proceedings. He conceded that Section 25 of the CNS Act relaxes strict application of Section 103 Cr.P.C, but argued that it does not authorize the deliberate exclusion of private witnesses in circumstances where they are easily available. He submitted that the so-called reluctance of passersby, as routinely claimed by prosecution, cannot be accepted at face value, particularly when all witnesses are subordinate officials of the same ANF setup. He contended that non-association of independent witnesses, despite their availability, casts serious doubt on the genuineness of the alleged recovery.

16. He further pointed out material contradictions and irregularities surrounding the arrest of the appellant more than one year after the alleged incident. He submitted that the appellant was not an absconder in the ordinary sense, as he had approached the courts for pre-arrest bail, thereby subjecting himself to the process of law. Yet, the investigating agency did not arrest him earlier, nor did it conduct any identification proceedings. He referred to contradiction between the oral testimony that the appellant was wearing blue clothes at the time of arrest and the contents of the arrest memo mentioning yellow clothes. According to him, such inconsistency with regard to a basic fact like clothing of the accused at the time of arrest renders the prosecution version doubtful and shows the casual manner in which the documents were prepared.

17. The learned counsel also drew attention to the non-examination of co-mashir PC Operator Toufique-ul-Hassan, who had allegedly attested the recovery memo, and co-mashir of arrest PC Khuram Shahzad. He submitted that these were material witnesses who were deliberately withheld, attracting an adverse presumption under Article 129(g) of the *Qanun-e-Shahadat* Order, 1984 that their evidence, if produced, would not have supported the prosecution. He also highlighted that although a letter was issued to NADRA for verification of the CNIC allegedly recovered from the wallet, no verification report was produced in court, thus leaving the most crucial link of identity uncorroborated by the competent authority that maintains national data. Furthermore, he submitted that there is duplication of Malkhana entry No.529 with respect to both the case property and the cash allegedly recovered later from the appellant, which is a serious irregularity in maintenance of the chain of custody.

18. The learned counsel also pointed out that there is a delay of around fifty days between dispatch of the samples to the Chemical Examiner and the issuance of the report. Such delay, he contended, is unexplained and creates doubt about the safe custody and safe transmission of the case property. He argued that the possibility of tampering cannot be ruled out under these circumstances. He

further contended that the prosecution story itself is inherently improbable, in that a person allegedly carrying contraband worth significant value would voluntarily throw it away in such a manner and that his wallet would coincidentally fall at the same spot; and secondly, that a single individual on foot could elude a raiding party of eleven armed officials in official vehicles. According to him, such improbabilities, coupled with the admissions and contradictions on record, make the prosecution narrative highly doubtful. He relied on case-law reported as (2022 P.Cr.L.J 492), (2022 P.Cr.L.J 1233) and (2023 SCMR 139) to argue that where exclusive possession is not proved, independent witnesses are not associated, material witnesses are withheld and investigation suffers from serious defects, the accused is entitled to acquittal by extending benefit of doubt.

19. Conversely, Mr. Jatoi learned Special Prosecutor ANF supported the impugned judgment and argued that the prosecution has successfully established the charge. He submitted that the complainant and other ANF officials have fully supported the prosecution case and that their evidence is confidence-inspiring. He urged that the recovery of 10 kilograms of *charas* from the travelling bag and the positive Chemical Examiner’s report conclusively establish that the recovered substance was charas. He emphasized that the wallet and CNIC recovered at the spot belong to the appellant and that the appellant has failed to produce any convincing evidence to substantiate his plea that ANF officials had raided his house and forcibly taken the wallet.

20. The learned Prosecutor ANF further argued that, under Section 25 of the CNS Act, strict compliance of Section 103 Cr.P.C regarding association of private mashirs is not necessary in narcotics cases. He contended that reluctance of private witnesses to testify in matters involving drug dealers, out of fear, is a ground recognized by law and that evidence of official witnesses cannot be discarded merely on the basis of their official status in the absence of proof of enmity or mala fide. He further submitted that the appellant is a habitual offender involved in narcotic trade, as evident from his previous involvement in FIRs

bearing Nos.130 of 2016 and 57 of 2020, and that the huge quantity of narcotic substance recovered in the present case cannot reasonably be foisted by police by expending large sums of money from their own pockets. He argued that the chain of custody has been sufficiently proved and that the delay in issuance of Chemical Examiner's report is not fatal in the absence of proof of tampering. In the end, he took the stance that in view of the social menace caused by narcotic substances, courts must take a strict view and should not lightly interfere in convictions recorded by the trial courts where the evidence is adequate.

21. We have extended anxious consideration to the arguments advanced by the learned counsel for the appellant as well as the learned Prosecutor for the State and have carefully examined the entire evidence and record of the case. The pivotal question for determination is whether the prosecution has succeeded in establishing, beyond reasonable doubt, that the travelling bag containing 10 kilograms of charas was in the exclusive and conscious possession of the appellant and that he is the same person who allegedly threw the bag at the spot.

22. The first and most fundamental aspect is the question of exclusive possession. Both the complainant PW–1 and mashir of recovery PW–2 have unequivocally conceded that the appellant was not arrested at the spot along with the recovered charas and that the charas was not recovered from his exclusive possession. This is not a mere omission; it is a direct and categorical acknowledgment that the case is not one of physical possession but at best one of attribution based on circumstantial links. The Supreme Court in the case of *Bashir Ahmed Detho* (2016 MLD 291) has held that even if it is assumed that *charas* was found at the place mentioned, it must be established through reliable evidence that the accused was the person who had left it there, and that recovery in such circumstances cannot be said to be from his exclusive possession. In the present case, the prosecution itself admits that the appellant escaped from the spot, was not apprehended red-handed, and that the bag was not recovered from his body or immediate control. Thus, the crucial element of exclusive possession remains unproved.

23. The second important aspect is that of identification. The entire edifice of the prosecution case rests on the assertion that a spy informer, whose name and particulars are not disclosed, pointed out one person at the spot as being the appellant. That informer was never examined at trial. No test identification parade was conducted, despite the fact that the appellant was arrested more than a year after the alleged incident. The alleged disclosure made by the appellant at the time of arrest is, in any event, inadmissible being hit by Article 38 of the *Qanun-e-Shahadat* Order, 1984 and Section 25 of the Evidence Act principles, and cannot be used as substantive evidence of guilt. Therefore, the only material connecting the appellant with the person seen at wardhat is the uncorroborated and untested oral claim of official witnesses that a spy informer pointed him out. This, in my view, falls considerably short of the rigorous standard of proof beyond reasonable doubt in a serious charge under Section 9(c) of CNS Act.

24. The third feature is the non-association of independent witnesses in the recovery proceedings, despite the admitted fact that the spot is near a bank in a city area and that people were present. Although Section 25 of the CNS Act excludes compulsory application of Section 103 Cr.P.C, the consistent view of the superior courts is that deliberate failure to associate private witnesses, where they are readily available, remains a relevant circumstance for assessing credibility. In the instant case, all witnesses to the recovery, including the mashirs, belong to the same force and serve under the same command. Their evidence cannot be discarded solely on that ground, but where such official evidence is further marred by admissions, omissions and contradictions, the absence of independent corroboration assumes critical significance.

25. Another important infirmity in the prosecution case arises from the circumstances of the arrest of the appellant. He was not apprehended on the day of occurrence but arrested about thirteen months later from outside the Sessions Court Khairpur upon dismissal of interim bail. The prosecution has not offered a convincing explanation as to why, during this entire intervening period, no steps

were taken to hold an identification parade or to confront him with witnesses. Moreover, there is a material inconsistency with regard to his clothing at the time of arrest: while oral testimony describes him as wearing blue clothes, the arrest memo, as pointed out by the defence, describes his dress as yellow. Such inconsistency, touching a simple and observable fact, reflects poorly on the reliability of the arrest narrative and suggests that documents may have been drafted with some degree of carelessness or afterthought.

26. The non-examination of crucial witnesses is another serious deficiency. Co-mashir of recovery, PC Operator Toufique-ul-Hassan, whose signatures appear on the memo, was not examined. Similarly, co-mashir of arrest, PC Khuram Shahzad, was also withheld. No justification for their non-production has been given. In terms of Article 129(g) of the *Qanun-e-Shahadat* Order, an adverse inference may be drawn that if produced, their testimony would not have supported the prosecution version. This inference is further reinforced by the fact that the prosecution premises its entire case on official witnesses, and yet chooses to keep two of them away from the witness box.

27. The failure to obtain and produce NADRA verification of the CNIC allegedly recovered from the wallet is yet another notable lapse. The prosecution itself claims to have written to NADRA for verification but candidly admits that no report was received. In a case where identity is central and where a CNIC is the primary documentary link tying the appellant to the wallet and the wallet to the bag, such non-verification leaves a serious gap. In the absence of an official verification that the CNIC is genuine and indeed belongs to the appellant, the evidentiary value of that document is considerably diminished.

28. The record of *Malkhana* entries also reveals duplication of entry No.529 for both the case property initially deposited and the cash of Rs.300/– allegedly recovered later from the appellant at the time of arrest. Proper maintenance of Malkhana record is vital to the integrity of the chain of custody, especially in narcotic cases where quantity and nature of contraband are decisive

for sentencing. When the same entry number is loosely used for distinct items at different times, the possibility of confusion and mismanagement of case property cannot be discounted.

29. There is also an unexplained delay of about fifty days between dispatch of the samples and issuance of the Chemical Examiner's report. While mere delay is not always fatal, in the absence of any explanation as to the reason for such delay and in the absence of unimpeachable proof of safe transit and safe custody during the interregnum, this factor introduces yet another element of doubt. A positive Chemical Examiner's report undoubtedly proves that whatever was tested was charas, but it does not, in itself, prove that such charas was recovered from the possession of the appellant or even from the same travelling bag allegedly left at the spot.

30. Not only does the case suffer from legal and procedural infirmities; the prosecution narrative also appears inherently improbable when measured against common sense. The story that a lone individual carrying a travelling bag with narcotic substance managed to escape unscathed from a raiding party of eleven armed officials in official vehicle(s) in a public area strains credulity. Moreover, it is not in line with normal human conduct that a person dealing in contraband worth significant value would unhesitatingly throw away his entire stock on spotting police, and that simultaneously his wallet would also fall at the exact same location. If he was running, the wallet could have fallen at any point along his escape route. The coincidence that both the bag and wallet ended up conveniently at the same spot for easy recovery is too neat to inspire confidence.

31. The learned trial court relied upon the principle that evidence in narcotics cases is to be weighed in golden scales, as enunciated in *Ismaeel v. State* (2010 SCMR 27), and upon the proposition that official witnesses are as good as private witnesses, as recognized in various precedents including *Mureed v. State* (PLD 2002 Karachi 530). These propositions, in the abstract, are unexceptionable. However, weighing evidence in golden scales does not mean lowering the standard

of proof; rather, it mandates heightened scrutiny, given the severity of punishment and the stigma attached. Similarly, the proposition regarding official witnesses assumes that their testimony is otherwise consistent, coherent and free from material infirmities. The present case is distinguishable on facts because here the official witnesses themselves make admissions which destroy the element of exclusive possession and highlight investigative shortcomings.

32. The deficiencies enumerated above cannot be brushed aside as minor discrepancies or technical irregularities. They go to the root of the prosecution case and affect the very question whether the guilt of the appellant has been established beyond reasonable doubt. The law is well settled that it is the prosecution which has to stand on its own legs and prove its case; any benefit of doubt arising from the evidence must go to the accused as a matter of right, not of grace or concession. The Supreme Court in *Tariq Pervez v. The State* (1995 SCMR 1345) has authoritatively laid down that if there arises a single circumstance that creates reasonable doubt in the prudent mind regarding the guilt of the accused, such doubt must be resolved in favour of the accused. In the present matter, there are not one but numerous circumstances generating serious doubt: lack of exclusive possession; doubtful identification; absence of independent witnesses; non-examination of material official witnesses; failure to obtain NADRA verification; duplication in Malkhana entries; unexplained delay in chemical examination; and inherent improbabilities in the prosecution narrative.

33. While it is true that offences involving narcotic substances are grave and pose a serious threat to society, the gravity of an offence cannot justify a departure from settled principles of criminal jurisprudence. It is a cardinal principle of our criminal justice system that it is better that several guilty persons escape than that one innocent be wrongfully convicted. Courts are duty-bound not to uphold convictions founded upon shaky, inherently doubtful or deficient evidence merely to demonstrate firmness against crime. True firmness lies in adhering, without compromise, to the standard of proof and to the presumption of innocence which protects every citizen.

34. In the light of the discussion above, this Court is constrained to hold that the prosecution has failed to establish an unbroken, credible and confidence-inspiring chain of evidence connecting the appellant with the travelling bag and the recovered charas. The case presented by the prosecution is interspersed with doubts at every stage from the alleged pointation and flight, to recovery, to investigation, to arrest and to the handling of case property. The cumulative effect of these deficiencies is that the impugned conviction is not sustainable in law.

35. Consequently, the appellant is entitled to the benefit of doubt. The impugned judgment dated 18.09.2023 passed by the learned 1st Additional Sessions Judge/Special Judge (CNS), Khairpur, in Special Case No.195 of 2022 is set aside. The conviction and sentence awarded to the appellant Syed Zulfiqar Ali Shah under Section 9(c) of the Control of Narcotic Substances Act, 1997 are hereby quashed. The appellant is acquitted of the charge by extending him benefit of doubt. He shall be released forthwith if not required in any other case. The case property shall be disposed of in accordance with law.

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