IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Special Criminal Jail Appeal No.D-214 of 2016
[Islam Khan Shinwari Pathan v. The State]

Before:
Mr. Justice Muhammad Faisal Kamal Alam
Justice Ms. Tasneem Sultana

Appellant	:	Mr. Islam Khan Shinwari Pathan, through Mr. Shahid Ali Memon, Advocate.
The State	:	Through Mr. Aftab Ahmed Shar, Additional PG for the State.
Date of hearing	:	**08.10.2026**
Date of decision	:	**11.11.2026**

JUDGMENT

***Muhammad Faisal Kamal Alam, J*:** This Criminal Jail Appeal is directed against the Judgment dated 24.10.2016, passed by the learned Sessions Judge/Special Judge (CNSA), Khairpur, in Special Case No.21 of 2016, arising out of Crime No.01 of 2016, registered at Excise Police Station, Gambat, under Section 9 (c) of the Control of Narcotic Substances Act, 1997-**the Act.** By the impugned Judgment, the Appellant, Islam Khan (also described in the Paper Book as Islam Shaikh), was convicted under Section 9(c) of the Act and sentenced to rigorous imprisonment for life, with a fine of Rs.100,000/- and in default of payment thereof, to suffer simple imprisonment for one year. The benefit of Section 382-B Cr.P.C. was extended to him. The case against

Co-accused Toor Khan, who was declared a Proclaimed Offender, was kept on the dormant file.

2. The prosecution case, in brief, is that on 10.02.2016, at about 1:30 p.m., an Excise party, while checking vehicles at the Excise Check Post, Rasoolabad, situated on the National Highway, District Khairpur, noticed a truck/trailer bearing registration No.TLM-893 approaching from the Sukkur side. The appellant, who was driving the vehicle, was signalled to stop but accelerated it in an attempt to drive away, whereupon the Excise party intercepted it. Upon its search, two plastic jerry cans were found in the cabin behind the driver's seat, containing forty packets of charas, twenty in each can, weighing in all 40 kilograms. The recovered charas was sealed in a plastic bag at the spot in the presence of two Excise officials appointed as mashirs. The driver disclosed his name as Islam Khan son of Ghalamia Shaikh. Thereafter, the appellant and the case property were brought to Excise Police Station, Gambat, where the FIR was registered on behalf of the State.

3. After usual investigation, the Excise police submitted a charge-sheet under Section 173, Cr.P.C., against the appellant. The learned trial Court supplied the requisite documents to the appellant under Section 265-C, Cr.P.C. Thereafter, a formal charge was framed against him, to which he pleaded not guilty and claimed trial.

4. To prove its case, the prosecution examined two witnesses, namely, PW-1 complainant and Investigating Officer Excise Inspector Liaquat Ali Dogar at Exh.05 and PW-2 Excise Constable Lakhmir Khan, mashir of recovery, at Exh.06. The complainant produced the movement entry at Exh.5/A, mashirnama of arrest and recovery at Exh.5/B, arrival entry at Exh.5/C, FIR at Exh.5/D, forwarding letter at Exh.5/E,

laboratory receipt at Exh.5/F and Chemical Examiner's report at Exh.5/G. Thereafter, the prosecution closed its side through a statement at Exh.07.

5. The statement of the Appellant was recorded under Section 342, Cr.P.C., at Exh.08, wherein he denied the allegations levelled against him, claimed innocence and pleaded false implication. However, he neither examined himself on oath under Section 340(2), Cr.P.C., nor led any evidence in defence. After conclusion of the trial and hearing learned counsel for the Appellant and learned prosecutor for the State, the learned trial Court convicted and sentenced him vide judgment dated 24.10.2016. Being aggrieved, he has preferred the instant appeal.

6. Learned counsel for the Appellant contends that the prosecution has failed to establish safe custody and safe transmission of the alleged narcotics; that, according to the complainant's own testimony, the charas was in the custody of Excise Constable Munawar Ali during preparation of the mashirnama, and the documentary record also shows that the property was sent to the Chemical Examiner through him, but he was not examined before the trial Court; that the relevant Malkhana record/Register No. XIX was not produced, nor was the Malkhana Incharge examined; and that no independent person was associated as a mashir despite the alleged recovery having taken place at a public check post on the National Highway. He submits that these omissions create serious doubt about the recovery, identity and safe custody of the case property and prays for acquittal of the Appellant by extending him the benefit of doubt.

7. Conversely, the learned Additional Prosecutor General supports the impugned Judgment and argues that the complainant and the mashir

have consistently supported the recovery of 40 kilograms of charas from the truck driven by the Appellant; that the Chemical Examiner's report is positive and records receipt of the plastic katta with intact seals corresponding with the specimen sent, which, according to him, establishes that the property was not tampered with; and that the official witnesses had no reason to falsely implicate the appellant. He, therefore, prays for dismissal of the appeal.

8. Heard. Record perused.

9. On reappraisal of the evidence, it appears that the prosecution relies principally upon the testimony of PW-1, the complainant, and PW-2, an Excise Constable who acted as a mashir. Both witnesses support the alleged recovery of forty packets of charas from two jerry cans lying behind the driver's seat of the vehicle driven by the appellant. Their evidence regarding the alleged recovery, however, has to be assessed not in isolation but also in the light of the subsequent handling, custody and transmission of the recovered property.

10. During cross-examination, PW-1 states that the charas was weighed by Excise Constable Munawar Ali in his presence and sealed by Excise Constable Nawab. He further states that, at the time of preparation of the mashirnama, the charas was in the custody of Munawar Ali. PW-2, however, states that the complainant weighed the charas, both mashirs sealed it, and the charas was "in our custody" during preparation of the mashirnama. Their accounts also differ regarding the sequence of sealing. PW-1 states that the mashirnama was prepared first and the charas was sealed thereafter, whereas PW-2 states that the charas was sealed before preparation of the mashirnama. These differences concern the handling and sealing of the recovered substance

and assume significance when considered with the deficiencies in the evidence of its subsequent custody.

11. Both witnesses state that the entire recovered charas was sent to the laboratory, which is also reflected in the forwarding letter, Exh.5/E, and the Chemical Examiner's report, Exh.5/G. The property was recovered on 10.02.2016 and delivered to the laboratory on the following day. Although the witnesses state that the appellant and the case property were brought to the police station at 5:45 p.m., neither explains where the sealed property was kept thereafter or who retained its custody until dispatch. The prosecution did not produce the relevant entry of Register No. XIX to establish its deposit in the Malkhana, nor was the Malkhana Incharge examined to prove receipt of the property, its retention in safe custody or its subsequent handing over for transmission to the Chemical Examiner. The complainant's statement that Munawar Ali held the charas during preparation of the mashirnama does not account for its safe custody after arrival at the police station.

12. The Chemical Examiner's report, Exh.5/G, records that the property was received through Excise Constable Munawar Ali. The forwarding letter and laboratory receipt also show its dispatch and receipt through him on 11.02.2016. However, he was not examined to establish when and from whom he received the sealed property and its safe transmission to the laboratory. In the absence of the relevant Malkhana record, evidence accounting for safe custody at the police station and the testimony of the carrier, an essential link in the chain of custody remains unproved.

13. In *Ikramullah and others v. The State* (2015 SCMR 1002), the Honourable Supreme Court, while examining safe custody and safe transmission of the recovered substance, observed:

> *"5. In the case in hand not only the report submitted by the Chemical Examiner was legally laconic but safe custody of the recovered substance as well as safe transmission of the separated samples to the office of the Chemical Examiner had also not been established by the prosecution. It is not disputed that the investigating officer appearing before the learned trial court had failed to even to mention the name of the police official who had taken the samples to the office of the Chemical Examiner and admittedly no such police official had been produced before the learned trial Court to depose about safe custody of the samples entrusted to him for being deposited in the office of the Chemical Examiner. In this view of the matter the prosecution had not been able to establish that after the alleged recovery the substance so recovered was either kept in safe custody or that the samples taken from the recovered substance had safely been transmitted to the office of the Chemical Examiner without the same being tampered with or replaced while in transit."*

14. The same principle was reiterated in *Qaiser and another v. The State* (2022 SCMR 1641), wherein the Honourable Supreme Court observed:

> *"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 or the said sample parcels in the concerned laboratory."*

The Honourable Supreme Court further observed:

> *"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 the prosecution would cast doubt and would vitiate the conclusiveness and reliability of the report of chemical examiner."*

15. The Chemical Examiner's report, Exh.5/G, records that the plastic katta was received with two intact seals corresponding with the specimen sent. This establishes its condition at the time of receipt by the laboratory. It does not, however, establish where the recovered property was kept after arrival at the police station or how it remained in safe custody before dispatch. The forwarding letter and laboratory receipt establish the recorded dispatch and receipt of the property, but neither accounts for its safe custody at the police station. That omission remains unexplained, particularly when no custodian was examined, the relevant custody record was not produced and Munawar Ali was not examined regarding its transmission. The positive Chemical Examiner's report, therefore, cannot by itself cure this deficiency.

16. The aforesaid omission is not a mere procedural irregularity. It goes to the root of the prosecution case, as the prosecution was required to establish, through reliable evidence, that the substance examined by the Chemical Examiner was the very substance allegedly recovered from the appellant and that the case property remained untampered with until its delivery to the laboratory. When the failure to establish safe custody and transmission is considered along with the inconsistencies between the evidence of PW-1 and PW-2 concerning the handling and sealing of the recovered charas, the conclusion is that the prosecution evidence lacks the standard of proof required for sustaining a conviction. It is settled law that the prosecution must prove its case beyond reasonable doubt and that even a single circumstance creating reasonable doubt entitles the accused to its benefit as a matter of right. The appellant is, therefore, entitled to such benefit.

17. Consequently, this Criminal Jail Appeal is allowed. The impugned judgment dated 24.10.2016, passed by the learned Sessions Judge/Special Judge (CNSA), Khairpur, in Special Case No.21 of 2016, is set aside to the extent of the appellant, Islam Khan. He is acquitted of the charge by extending him the benefit of doubt and shall be released forthwith if not required to be detained in any other case.

JUDGE

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