

HCJDA 38
JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Crl. Appeal No.40132/2023

Mst. Shahidah Bibi Versus The State, etc.

JUDGMENT

Date of hearing:	<u>13.11.2024</u>
Appellant by:	Malik Aqib Javaid, Advocate along with Mr. Muhammad Basit Hanif, Advocate.
State by:	Ms. Nuzhat Bashir, Deputy Prosecutor General assisted by Mr. Muhammad Naeem Tahir, Deputy District Public Prosecutor.

Farooq Haider, J.:- This appeal has been filed against the judgment dated: 18.05.2023 passed by learned Additional Sessions Judge, Jaranwala whereby in case arising out of F.I.R No.1631/2022 dated: 22.12.2022 registered under Section: 9(1)(3)(c) of the Control of Narcotic Substances Act, 1997 at Police Station: Khurrianwala, District Faisalabad, trial court has convicted and sentenced the appellant as under:-

under Section 9 (1)(3)(c) of Control of Narcotic Substances Act, 1997
to Rigorous Imprisonment for 09-years with fine of Rs.80,000/- and
in default thereof, to further undergo S.I for 06-months. Benefit of
Section 382-B Cr.P.C. was also extended to the appellant.

2. Briefly, case of prosecution as per written statement/ استغاثہ (Ex.PB)

sent by Kaleem Ullah Khan, ASI (complainant/PW-1) is that on 22.12.2022, he (complainant/PW-1) along with his companions/police officials was present at Bypass Chowk 229/RB Maku Aana for patrolling as well as compliance of miscellaneous orders (تعمیل احکامات متفرق) where spy information was received that a notorious narcotics seller namely Shahida was coming to give delivery of narcotics to a customer near Khurlani Tool Plaza Jaranwala Road; if barricade is installed, she could be apprehended; on such information, barricade was installed at Jaranwala metalled road towards *azafi abadi* (اضافی آبادی) 229/RB Maku Ana; after some time, a woman came from main road on foot and tried to turn back on seeing the police party; she was apprehended with the help of police officials being suspect; on query through lady constable, she disclosed her name as Mst. Shahida Bibi wife of Sadi

Ahmad, caste Kharal, resident of 229/RB Maku Ana; dark brown charas wrapped in yellow solution tape from a blue coloured polythene bag caught by her in her right hand was recovered; same was weighed on computerized scale and found as charas weighing 1500-grams; 75-grams charas was separated as sample for getting chemical analysis whereas remaining case property was also secured; both parcels with the stamp of K.K. were prepared and taken into possession through recovery memo.

After investigation, challan report was sent to the Court against the appellant; charge was framed against her, to which she pleaded not guilty; prosecution produced its evidence. Trial court recorded statement of the appellant under Section: 342 Cr.P.C. wherein she refuted allegations leveled against her, then trial court after hearing learned counsel for the parties, passed the impugned judgment, whereby appellant was convicted and sentenced as mentioned above.

3. Learned counsel for the appellant has contended that safe custody of case property has not been proved therefore conviction recorded and sentence awarded through impugned judgment is liable to be set aside; further requested for acceptance of instant appeal.

4. Conversely learned Deputy Prosecutor General assisted by learned Deputy District Public Prosecutor has supported the impugned judgment and requested for dismissal of this appeal.

5. **After hearing learned counsel for the appellant, learned Deputy Prosecutor General assisted by learned Deputy District Public Prosecutor and going through the record,** it has been noticed that as per case of prosecution mentioned in the *fard bian* (فرد بیان) of complainant (Exh.PB), on 22.12.2022, Kaleem Ullah Khan, ASI (PW-1) got recovered charas weighing 1500-grams from the appellant, 75-grams charas was separated as sample for getting chemical analysis, sample and remaining case property were secured through parcels in the presence of Shabana Khalid, 4930/LC (PW-4) and Amjad Yasin, 6107/HC (PW-6), who both witnesses attested the recovery memo (Exh.PA), which was prepared by Kaleem Ullah Khan, ASI (PW-1); similarly, Kaleem Ullah Khan, ASI (PW-1) clearly deposed in his statement before the court that he recovered 1500-grams charas from the appellant and out of the same, 75-grams was separated for forensic analysis, two parcels were prepared and taken into possession *vide*

recovery memo (Exh.PA) which was attested by Amjad Yasin 6107/HC and Shabana Khalid, 4930/LC; Zia Ullah/Investigating Officer came at the spot and he (complainant) handed over accused and two sealed parcels to him; relevant portions of his statement are as under:-

"Stated that on 22.12.2022, I was posted at P.S Khurrianwala. On the same day I alongwith Amjad Yasin 6107-HC, Zahid Farooq 4916-C, Shabana Khalid 4930-LC was present at by pass Chowk 229 R.B Makuna."

"After sometime of establishing picket, a lady was coming towards main road on foot who on seeing police party tried to run back she was apprehended on suspicion who afterwards disclosed her name Shahida Bibi. Upon her personal search by lady constable Charas Exh.P1 was recovered from the blue colored shopping bag wrapped in yellow tape which she was holding in her right hand. Recovered Charas was weighed on electronic scale and was found 1500 grams out of which 75 grams Charas was separated for forensic examination. Two sealed parcels were prepared with the stamps KK. The same was taken into possession vide recovery memo Exh.PA which was attested by Amjad Yasin 6107-HC and Shabana Khalid-LC. I drafted complaint Exh.PB and same was sent by Amjad Yasin to the police station for registration of FIR. Zia ullah I.O came at the place of occurrence who on our pointation prepared unscaled site plan and recorded the statement of witnesses. I handed over to him custody of the accused two sealed parcels and recovery memo."

however, Shabana Khalid, 4930/LC (PW-4) during her statement before the court categorically deposed that recovered charas was weighed at electronic scale, which was found as 1500-grams, out of which, 75-grams charas was separated for sample parcel, **Investigating Officer (I.O.) sealed both the parcels with the stamp K.K.** and were taken into possession *vide* recovery memo (Exh.PA) and the same were attested by her and Amjad Yaseen; further deposed that thereafter Investigating Officer (I.O.) prepared complaint and handed over the same to Amjad Yaseen to take it to the police station for registration of the FIR; relevant portion of her statement is hereby reproduced as under: -

*"It was weighed on electronic scale and was found to be 1500 gram out which 75 gram charas was separated for sample parcel. **I.O. sealed both the parcels with the stamp K.K and were taken into possession vide recovery memo Exh-PA and the same were attested by me and Amjad Yaseen. Thereafter I.O prepared complaint and handed over the same Amjad Yaseen to take it to the police station for registration of the FIR.**"*

(emphasis added)

It is relevant to mention here that Shabana Khalid, 4930/LC (PW-4) further deposed during cross-examination before the court that *Moharrir*

called her from police station for the purpose of arrest of Shahida; relevant portion of her statement is also hereby reproduced as under: -

"Muharrar called me from police station for purpose of arrest of Shahida."

(emphasis added)

whereas as per case of prosecution, it was claimed through *fard bian* (فرد بیان/Exh.PB) that she (PW-4) was accompanying the police party when Shahida (present appellant) was apprehended. It is relevant to mention here that she{Shabana Khalid (PW-4)} was neither re-examined nor questions were put to her on aforementioned points by the prosecution under Article 150 of Qanun-e-Shahadat Order, 1984, meaning thereby that aforementioned portions of her said statement were not denied/negated rather admitted by the prosecution. So, on the one hand securing and safe custody of parcel of sample as well as parcel of remaining case property has been compromised whereas on the other hand registration of case after preliminary inquiry/investigation is also reflecting on the record.

Perusal of the report of Punjab Forensic Science Agency, Lahore (Ex.PE) reveals that parcel of sample was received there on 26.12.2022 from Kaleem Ullah Khan, ASI however *Moharrir* namely Rashid Ali, 5849/MHC while appearing in the witness box as PW-5 has clearly deposed during cross-examination that on 26.12.2022, he handed over the sample parcel to Kaleem Ullah Khan, ASI at 6/6:15 p.m.; relevant portion of his statement is reproduced as follows: -

"On 26.12.2022, I handed over the sample parcel to Kaleem Ullah ASI, at 6/6.15 pm."

and he was neither re-examined nor asked question under Article: 150 of Qanun-e-Shahadat Order, 1984 on this point. Undoubtedly, this case pertains to District Faisalabad whereas Punjab Forensic Science Agency is situated in Lahore where parcel of sample was deposited and question does arise that if it (parcel of sample) was handed over by *Moharrir* to Kaleem Ullah, ASI on 26.12.2022 at 6/6.15 p.m., then how said parcel was received on the same day i.e. on 26.12.2022 in the office of Punjab Forensic Science Agency, Lahore but learned Prosecutor could not refer any material to answer said question and this mystery could not be resolved which has also compromised the safe transmission of parcel of sample to Punjab Forensic Science Agency, Lahore. Nutshell is that safe

custody of parcel of case property as well as parcel of sample has not been proved.

Now law is well settled on the point that unbroken chain of safe custody of “allegedly recovered case property and parcel of sample” is to be proved otherwise, conviction is not possible and it is rightly so because recovery of narcotics is not a mere corroboratory piece of evidence rather it constitutes the offence itself and entails punishment. Guidance in this regard has been sought from the case of “**The STATE through REGIONAL DIRECTOR ANF versus IMAM BAKHSH**” (**2018 SCMR 2039**); relevant portion whereof is being reproduced below: -

“Chain of Custody – Safe custody and safe transmission

9. We have noted above that in Criminal Appeals Nos.523 to 525/2017 and No.22/2018, safe custody and safe transmission of the alleged drug from the spot of recovery till its receipt by the Narcotics Testing Laboratory are not satisfactorily established. The chain of custody begins with the recovery of the seized drug by the Police and includes the separation of the representative sample(s) of the seized drug and their dispatch to the Narcotics Testing Laboratory. This chain of custody, is pivotal, as the entire construct of the Act and the Rules rests on the Report of the Government Analyst, which in turn rests on the process of sampling and its safe and secure custody and transmission to the laboratory. The prosecution must establish that the chain of custody was unbroken, unsuspicious, indubitable, safe and secure. Any break in the chain of custody or lapse in the control of possession of the sample, will cast doubts on the safe custody and safe transmission of the sample(s) and will impair and vitiate the conclusiveness and reliability of the Report of the Government Analyst, thus, rendering it incapable of sustaining conviction. This Court has already held in Amjad Ali v. State (2012 SCMR 577) and Ikramullah v. State (2015 SCMR 1002) that where safe custody or safe transmission of the alleged drug is not established, the Report of the Government Analyst becomes doubtful and unreliable.

20.

----- *The representative samples of the alleged drug must be in safe custody and undergo safe transmission from the stage of recovery till it is received at the Narcotics Testing Laboratory”*

(emphasis added)

In this regard, guidance has also been sought from the case of “**ABDUL GHANI and others versus The STATE and others**” (2019 SCMR 608); relevant portion whereof is reproduced as under:-

“There is hardly any occasion for discussing the merits of the case against the appellants because the record of the case shows that safe custody of the recovered substance as well as safe transmission of samples of the recovered substance to the office of the Chemical Examiner had not been established by the prosecution in this case. Nisar Ahmed, S.I./SHO complainant (PW1) had stated before the trial court that he had deposited the recovered substance at the Makhana of the local Police Station but admittedly the Moharrir of the said Police Station had not been produced before the trial court to depose about safe custody of the recovered substance. It is also not denied that Ali Sher, H.C. who had delivered the samples of the recovered substance at the office of the Chemical Examiner had also not been produced during the trial so as to confirm safe transmission of the samples of the recovered substance. It has already been clarified by this Court in the cases of The State through Regional Director ANF v. Imam Bakhsh and others (2018 SCMR 2039), Ikramullah and others v. The State (2015 SCMR 1002 and Amjad Ali v. The State (2012 SCMR 577) that in a case where safe custody of the recovered substance or safe transmission of samples of the recovered substance is not proved by the prosecution through independent evidence there it cannot be concluded that the prosecution had succeeded in establishing its case against the appellants beyond reasonable doubt. The case in hand suffers from the same legal defects. This appeal is, therefore, allowed, the convictions and sentences of the appellants recorded and upheld by the courts below are set aside and they are acquitted of the charge by extending the benefit of doubt to them. They shall be released from the jail forthwith if not required to be detained in connection with any other case.”

(emphasis added)

Further guidance has also been sought from the cases of “**MUHAMMAD HAZIR versus The STATE**” (2023 SCMR 986), “**ASIF ALI and another versus The STATE through Prosecutor General Punjab**” (2024 SCMR 1408) and “**SARFRAZ AHMED versus The STATE**” (2024 SCMR 1571). Since safe custody of the allegedly recovered charas and sample taken out of it, has not been proved in this case therefore report of Punjab Forensic Science Agency, Lahore (Exh.PE) is inconclusive and cannot be made basis for conviction. By now it is also well settled that if safe custody of allegedly recovered substance or parcel of sample/case property has not been proved then it straightforwardly leads to the acquittal of the accused; in this regard, guidance has been sought from the dictum laid down by the Supreme

Court of Pakistan in the *supra* cases of “**Abdul Ghani and others versus The State and others**” and “**The State through Regional Director ANF versus Imam Bakhsh**”.

Furthermore, for recording conviction and awarding sentence in a criminal case, it is mandatory to put entire incriminating material to the accused under Section: 342 Cr.P.C. in order to have his explanation/reply in said regard otherwise it would amount to “*audi alteram partem*” and in this regard, case of “**AMEER ZEB versus THE STATE**” (**PLD 2012 Supreme Court 380**) can be safely referred and its relevant portion from Page No.398 available at Paragraph No.6, is hereby reproduced for ready reference:-

“It is trite that a piece of evidence not put to the accused person at the time of recording of his statement under section 342, Cr.P.C. cannot be used against him by the prosecution.”

(emphasis added)

It goes without saying that in this case, Shabana Khalid, 4930/LC (PW-4) deposed in categorical terms that parcel of the sample and parcel of case property were prepared, sealed and taken into possession by the Investigating Officer and he (Investigating Officer) also prepared the complaint and then handed over the same (complaint) to Amjad Yasin whereas in the question No.2 under Section: 342 Cr.P.C., aforementioned material was not put to the accused rather preparation and taking into possession of said parcels by Kaleem Ullah Khan, ASI as well as preparation of complaint by said ASI has been asked through said question; relevant portion of the same is hereby reproduced below:-

“Two sealed parcels were prepared with stamp KK, one for sample parcel and other for remaining bulk case property were taken into possession vide recovery memo Ex.PA, by said ASI. Complainant Kaleem Ullah Khan ASI, prepared the complaint Ex.PB and handed over the same to Amjad Yaseen for taking the same to the police station for registration of the FIR.”

This state of affairs also goes against the prosecution.

6. It is trite law that single dent in case of prosecution is sufficient for acquittal, in this regard, reliance can be placed upon the cases of “**MUHAMMAD MANSHA versus The STATE**” (**2018 SCMR 772**), “**ABDUL JABBAR and another versus The STATE**” (**2019 SCMR 129**), “**Mst. ASIA BIBI versus The STATE and others**”

(PLD 2019 SC 64) and “AMIR MUHAMMAD KHAN versus The STATE” (2023 SCMR 566).

7. Outcome of the above discussion is that prosecution has been failed to prove its case against the appellant beyond shadow of doubt hence there is no need to discuss defence version.

8. Resultantly, instant appeal is allowed/accepted, conviction recorded and sentence awarded to Mst. Shahida Bibi (appellant) through the impugned judgment dated: 18.05.2023 passed in case arising out of F.I.R No.1631/2022 dated: 22.12.2022 registered under Section: 9(1)(3)(c) of the Control of Narcotic Substances Act, 1997 at Police Station: Khurrianwala, District Faisalabad, are hereby set aside; she is acquitted of the charge and will be released from jail forthwith if not required in any other case.

(ALI ZIA BAJWA)
JUDGE

(FAROOQ HAIDER)
JUDGE

APPROVED FOR REPORTING

(ALI ZIA BAJWA)
JUDGE

(FAROOQ HAIDER)
JUDGE

This judgment has been dictated and pronounced on 13.11.2024 whereas after preparation, signed on 14.11.2024.

Asif