

[Balochistan]

Before Muhammad Kamran Khan Mulakhail and Shaukat Ali Rakhshani, JJ

SADAM KHAN and another---Appellants

Versus

The STATE---Respondent

Criminal Appeals Nos. 111 and 140 of 2023, decided on 29th October, 2024.

(a) Control of Narcotic Substances Act (XXV of 1997)---

----S. 9(c)---Possession of narcotic substances---Appreciation of evidence---Recovery of contraband doubtful---Prosecution case was that 80-kilograms charas was recovered from the vehicle of accused persons---Record showed that complainant neither mentioned in his statement that as to whom he had handed over the parcels after the recovery nor did he state that when did the Investigating Officer came to the spot---During cross-examination, complainant admitted that from recovered eighty packets of baked charas, no separate samples were drawn and that only one parcel was prepared and sent for chemical analysis---Recovery witness stated during cross-examination that when parcel was opened although it contained 79 small packets, but in one packet only one slab was found present, which he produced---Said witness produced 78 packets of charas, each containing 2-slabs, whereas one packet contained half kilogram---Narcotics Testing Laboratory, after the analysis of narcotics in its report mentioned that 79 kilograms of Hashish Pukhta was being returned, but when recovery witness opened the said parcel, it weighed 78.5 kilograms, whereof there was no explanation regarding the missing 0.5 kilogram of 'charas', making the Narcotics Testing Laboratory Report and recovery of contraband doubtful---Appeal against conviction was allowed, in circumstances.

(b) Control of Narcotic Substances Act (XXV of 1997)---

----S. 9(c)---Possession of narcotic substances---Appreciation of evidence---Safe custody and transmission of the narcotic substances not proved---Prosecution case was that 80-kilograms charas was recovered from the vehicle of accused persons---Malkhana in-charge testified that on 17.06.2022, whilst he was present in the police station, Investigating Officer handed over to him four parcels, which he deposited in the Malkhana and made entry in Register No.19---Said witness although admitted to have made entry in Register No.19, but neither mentioned about serial number of entry nor did he produce the relevant page of Register No.19, which the prosecution was under obligation to produce---Malkhana in-charge in his examination-in-chief also did not state that when and to whom he had handed over one parcel for onward transmission to the office of Narcotics Testing Laboratory for chemical analysis---Thus, in view of the said statements, the entire process of safe custody and transmission of the narcotics from the place of recovery to the Malkhana and then its onward transmission to Forensic Science Laboratory became doubtful---Appeal against conviction was allowed, in circumstances.

The State v. Imam Bakhsh 2018 SCMR 2039 and Kamran Shah v. The State 2019 SCMR 1217 rel.

(c) Control of Narcotic Substances Act (XXV of 1997)---

----S. 9(c)---Possession of narcotic substances---Appreciation of evidence---Laboratory report not conclusive---Prosecution case was that 80-kilograms charas was recovered from the vehicle of accused persons---Narcotics Testing Laboratory Report was not worth considering for conviction and awarding sentence---Trial Court although had rightly considered the Fast Blue B Salt Test as presumptive test, but had wrongly construed the Thin Layer Chromatograph ("TLC") test as a confirmative test, which was in contravention of United Nations Office on Drugs and Crimes ("UNODC") guidelines and recommendations,

which considered the TLC test as presumptive test so defined in clause 4.6 of UNODC Manual i.e., Recommended Method for Identification and Analysis of Synthetic Cathinones in Seized Materials, 2015, making the Narcotics Testing Laboratory Report inconclusive---Appeal against conviction was allowed, in circumstances.

The State v. Imam Bakhsh 2018 SCMR 2039 and Khairul Bashar v. State 2019 SCMR 930 rel.

(d) Control of Narcotic Substances Act (XXV of 1997)---

---S. 9(c)---Possession of narcotic substances---Appreciation of evidence---Role of person sitting beside the driver---Prosecution case was that 80-kilograms charas was recovered from the vehicle of accused persons---As far as the case of appellant "AS"was concerned, his case was far better as he was found to be sitting beside the driver---Prosecution had failed to establish that he had any knowledge about the narcotics concealed in the floor of the said vehicle---Appeal against conviction was allowed, in circumstances.

Hussain Shah v. The State PLD 2020 SC 132 rel.

Abdul Wali Khan Nasir for Appellant (in Criminal Appeal No. 111 of 2023).

Abdul Karim Malghani for the State (in Criminal Appeal No. 111 of 2023).

Mubashir Hassan for Appellant (in Criminal Appeal No. 140 of 2023).

Abdul Karim Malghani for the State (in Criminal Appeal No. 140 of 2023).

Date of hearing: 10th October, 2024.

JUDGMENT

SHAUKAT ALI RAKHSHANI, J.---Veracity and legality of judgment dated 16.03.2023 ("impugned judgment") authored by Special Judge CNS, Kalat ("Trial Court") has been called in question by the appellants, arising out of FIR No.30 of 2022 (Ex.P/6-A) dated 17.06.2022 registered with Police Station City, Kalat, whereby the appellants were convicted and sentenced under section 9 (c) of Control of Narcotic Substances Act of 1997 ("Act of 1997") to suffer twenty five (25) years R.I each, with a fine of Rs.1,000,000/- (One million) and in default of payment of fine to further undergo six (6) months S.I each with the premium of Section 382-B of the Criminal Procedure Code, 1898 ("Cr.P.C.").

As the titled appeals stem from a common judgment, therefore, these appeals are being decided through this consolidated judgment.

2. Condensed but relevant facts necessary for disposal of the instant appeal are that complainant Nazeer Ahmed ASI (PW-1) got lodged the crime report ibid on the basis of report (Ex.P/2-A), averring therein that on 17.06.2022 at about 4:00 am, on a tip off, a Land Cruiser bearing Registration No.BD-2715 driven by Saddam Khan (appellant No.1), who was accompanied by Abdul Salam (appellant No.2) was intercepted during a blockade at National Highway Road near Mughalzai jump, wherein eighty (80) packets of baked 'charas', each weighing one (1) kg, total eighty (80) kgs hid inside the floor of said car were recovered.

The appellants were put on trial, where on commencement of trial, the prosecution in order to bring home the charge produced six (06) witnesses. The appellant was examined under section 342 of Cr.P.C., who denied the allegations and professed innocence. He neither opted to record his statement on oath nor produced any defence, thus the Trial Court convicted and sentenced the appellant vide judgment impugned herein in the terms mentioned in para supra.

3. Learned counsel for the appellant inter alia contended that the impugned judgment is perverse and sheer result of misreading of evidence. Added further that the Trial Court has failed to appreciate the evidence in its true prospective, particularly in establishing the safe custody and transmission of the contraband, which has made the impugned judgment a

nullity in the eyes of law, as such, the impugned judgment is unsustainable, hence requires to be overturned by allowing the appeals at hand.

Conversely, learned state counsel vigorously resisted the arguments advanced by the counsel for the appellant and urged that the Trial Court has well appreciated the evidence, which does not call for interference. He maintained further that the safe custody and transmission has also been proved beyond any shadow of doubt, thus, requested for dismissal of the appeals.

4. Heard. Record sussed out wall to wall with the able assistance of learned counsel for the parties.

5. The case set up by the prosecution is that on 17.06.2022 at about 4:00 am, a Land Cruiser bearing Registration No.BD-2715 driven by appellant No.1, who was accompanied by appellant No.2 seated beside him was intercepted at a blockade near National Highway Road at Mughalzai jump, whereupon search, eighty (80) kgs of baked 'charas' fitted in the floor of the said vehicle were recovered, whereof parcel Nos.1 to 4 were prepared. Complainant Nazeer Ahmed ASI (PW-1) reiterated what he had mentioned in his report (Ex.P/2-A). Complainant (PW-1) neither mentioned in his statement that as to whom he had handed over the said parcels after the recovery nor did he state that when did Abdul Qadir Investigation Officer ("IO") (PW-6) came on the spot. During cross-examination, he admitted that from recovered eighty (80) packets of baked 'charas' no, separate samples were drawn and that only parcel No.1 was prepared and sent for chemical analysis.

6. Sabzal Khan Constable (PW-3) being recovery witness produced recovery memos. of eighty (80) packets of 'charas', parcel Nos.1 to 4 and Land Cruiser bearing Registration No.BD-2715 as (Ex.P/3-A), (Ex.P/3-B) and (Ex.P/3-C) respectively. He also produced sealed parcels, samples and vehicle as Art.P/1 to Art.P/6. During examination-in-chief, when parcel No.1 was opened although it contained 79 small packets, but in one packet only one slab was found present, which he produced as Art. P/3 to Art. P/81. He produced 78 packets of 'charas', each containing 2 slabs as Art.P/82 to Art.P/237, whereas one packet contained half kg as Art.P/238.

It is imperative to add that the Federal Narcotics Testing Laboratory, Balochistan Quetta ("FNTL, Quetta") after the analysis of narcotics in its report (Ex.P/6-K) mentioned that 79 kgs of Hashish Pukhta (Net) is being returned, but when recovery witness Sabzal Khan (PW-3) opened the said parcel, it weighed 78.5 kg, whereof there is no explanation regarding missing 0.5 kg of 'charas', making the FNTL, Quetta report (Ex.P/6-K) and recovery of contraband cloudy.

7. The prosecution in order to establish the safe custody and transmission of the narcotics produced Abdul Qayyum malkhana in-charge (PW-4). He testified that on 17.06.2022, whilst he was present in the police station, Abdul Qadir IO (PW-6) handed over him parcels Nos.1 to 4, which he deposited in the malkhana and made entry in Register No.19. He (PW-4) although admitted to have had made entry in Register No.19, but neither mentioned about serial number of entry nor did he produce the relevant page of Register No.19, which the prosecution was under obligation to produce. Malkhana incharge (PW-4) in his examination-in-chief also did not state that when and to whom he had handed over back parcel No.1 for onward transmission to the office of FNTL, Quetta for chemical analysis, thus in view of the above statements, the entire process of safe custody and transmission of the narcotics from the place of recovery to the malkhana and then its onward transmission to FSL, Karachi becomes doubtful. SEE; ["The State v. Imam Bakhsh" (2018 SCMR 2039) and "Kamran Shah v. The State" (2019 SCMR 1217)].

8. Ali Ahmed SI (PW-5) is witness of disclosure memos. (Ex.P/5-A) and (Ex.P/5-B), which are inadmissible as the recovery was already made. Abdul Qadir IO (PW-6) produced FIR (Ex.P/6-A) and FNTL, Quetta report as (Ex.P/6-K).

9. Besides above, the FNTL, Quetta report (Ex.P/6-K) is also not worth of consideration for conviction and awarding sentence. The Trial Court although has rightly considered the Fast Blue B Salt Test as presumptive test, but has wrongly construed the Thin Layer Chromatograph ("TLC") test as a confirmative test, which is in contravention of United

Nations Office on Drugs and Crimes ("UNODC") guidelines and recommendations, which considers the TLC test as presumptive test so defined in clause 4.6 of UNODC Manual i.e., Recommended Method for Identification and Analysis of Synthetic Cathinones in Seized Materials, 2015, making the FNTL, report inconclusive. Furthermore, the FNTL, report (Ex.P/6-K) also offends the dictum expounded by the apex court in the cases titled as "The State v. Imam Bakhsh" (2018 SCMR 2039) and "Khairul Bashar v. State" (2019 SCMR 930). For ready reference, the relevant para No.19 of Imam Bakhsh's case supra is reproduced herein below;

"19. Efficient, credible and proficient Narcotics Testing Laboratories are integral for successful execution of the Act and the Rules. The said laboratories have to be manned by competent analysts having prescribed qualifications. Rule 3 provides for the qualifications of a Government Analyst and it has already been held to be a mandatory provision by this Court. Further, the obligations of the Government Analysts under these Rules must be complied with for ensuring accurate and meaningful chemical analysis. In order to standardize the Narcotics Testing Laboratories across the country, the protocols and tests applied by these laboratories must meet common international standards, e.g. Guidelines issued by the United Nations Office on Drugs and Crime (UNODC) or Scientific Working Group for the Analysis of Seized Drugs (SWGDRUG) or the International Organization for Standardization (ISO)-17025:2017. We, therefore, direct the Federal Government and the respective Provincial Governments to ensure that the Government Analysts in the Narcotics Testing Laboratories are qualified as per Rule 3, the tests and their protocols are common across the country are as per International guidelines. The officials of the National and Provincial Narcotics Testing Laboratories shall follow the Rules in the best manner possible so that efficient and meaningful chemical analysis can be achieved. In case of failure, disciplinary action be taken against the officials, in accordance with law."

10. As far as the case of appellant Abdul Salam is concerned, his case is far better as he was found to be sitting beside the driver. The prosecution has miserably failed to establish that he had any knowledge about the narcotics having been concealed in the floor of the said vehicle. In this regard reliance can be placed upon the case of "Hussain Shah v. State (PLD 2020 SC 132). Relevant excerpt of Hussain Shah's case supra follows as under;

"6. As far as Abdul Sattar appellant is concerned it was alleged by the prosecution that he was a cleaner and a helper of his co-convict namely Hussain Shah and he was travelling in the same vehicle when the said vehicle was intercepted by the raiding party. It has been pointed out before us that that according to the evidence brought on the record Abdul Sattar appellant also knew about existence of a cavity in the body of the relevant vehicle but nothing had been said by any prosecution witness about the said appellant having the requisite knowledge about availability of narcotic substance in such cavity of the vehicle. As a matter of fact no evidence worth its name had been brought on the record to establish that the said appellant was conscious about availability of narcotic substance in a secret cavity of the relevant vehicle in which he was traveling along with its driver. The law is settled by now that if the prosecution fails to establish conscious possession or knowledge in that regard then a passenger cannot be convicted solely on the basis of his availability inside a vehicle at the relevant time. This appeal is, therefore, allowed to the extent of Abdul Sattar appellant, his conviction and sentence recorded and upheld by the courts below are set aside and he is acquitted of the charge by extending the benefit of doubt to him. Abdul Sattar appellant shall be released from the jail forthwith if not required to be detained in connection with any other case."

[Under line is ours]

11. In light of the above discussion, we believe that the prosecution has miserably failed to prove the indictment against the appellants and that reasons drawn by the Trial Court are based on misreading and improper appraisal of evidence, which requires to be meddled with.

12. For the foregoing reasons, the appeals are allowed and consequently, the impugned judgment of the Trial Court dated 16.03.2023 is set-aside and the appellants are acquitted of the charge, who be released forthwith, if not incarcerated in any other case.

141/Bal.

Appeals allowed.