

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
(JUDICIAL DEPARTMENT)

Criminal Appeal No. 39 /2014

Nizabat Mehmood

Versus

The State

Appellant by:	Raja Rizwan Abbasi, Advocate.
State by:	Mr. Zohaib Hassan Gondal, State Counsel with Asif Riaz- Sub-Inspector and Jamshaid Khan- Inspector.
Date of Hearing:	09.07.2020

Ghulam Azam Qambrani, J.: The appellant, through the instant Criminal Appeal has assailed impugned judgment, dated 26.04.2014 passed by the learned Additional Sessions Judge/Special Judge CNSA, Islamabad (East) in case F.I.R No.84, dated 21.03.2011 registered at Police Station Bhara Kahu, Islamabad, for the offence punishable under Sections 9(C) and 15 of the Control of Narcotic Substances Act, 1997. The impugned judgment was pronounced after finding the appellant guilty for an offence under section 9(B) of the Control of Narcotic Substances Act, 1997 and sentenced him to imprisonment for two (02) years and fine of Rs.20,000/- and in default, he shall suffer simple imprisonment of one (01) month.

2. The factual matrix of the case is that during interrogation Faizan Anjum/accused of F.I.R No.83 of 2011, disclosed that he had purchased the Chars, recovered in the said case from Sweet Mart General Store Athal. Resultantly, police took him to the said General store; that Nizabat, appellant/convict of the instant case, on seeing police party tried to slip away, while carrying a black coloured

shopping bag in his right hand but he was overpowered by the police. Upon checking, 2000 grams Chars Garda was found in the bag. Muhammad Riaz, accused in the instant F.I.R, present at the counter of the store by that time was also apprehended and booked in the instant case as co-accused.

3. After usual investigations, the police submitted final report before the learned trial Court, who took cognizance of the offence. The learned trial Court framed the charge against the appellant/convict on 10.09.2012; appellant pleaded not guilty and claimed trial.

4. In order to establish the case, the prosecution examined following four witnesses.-

- *PW-1 Raja Majid Ali (Moharrir): kept the contraband in safe custody and handed over samples parcel to Sajid Raza/C for chemical examiner.*
- *PW-2 Ejaz Ahmed, A.S.I: secured and signed recovery memos Exh.PA, PB & PC,*
- *PW-3 Muhammad Aslam, Sub-Inspector: after receiving complaint, Exh.PE, chalked out F.I.R Exh.PD.*
- *PW-4 Jamshed Khan, is complainant as well as investigating officer of the case.*

Prosecution closed the evidence by submitting report of chemical examiner as Exh.PF.

5. After closure of the prosecution evidence, the appellant/convict was examined u/s 342 Cr.P.C., wherein he categorically denied the accusation and claimed innocence. The accused did not opt to record his statement under Section 340 (2) Cr.P.C. However, in his defence, the appellant/convict produced copies of police docket regarding the dispatch of sample parcel to chemical examiner, copy of petition and order passed in writ petition No.1128 of 2013 titled as "*Nasreen Bibi Vs.*

Justice of the Peace and others”, alongwith the inquiry report held in writ petition No.4943 of 2010 by learned Sessions Judge, Islamabad, writ petition No.4993 of 2010 & writ petition No.1395 of 2011 titled *“Muhammad Riaz vs. S.S.P Islamabad and others”* as Ex.DA to Ex.DD, respectively.

6. After hearing the final arguments, the learned trial Court acquitted the co-accused namely, Muhammad Riaz and convicted the appellant by means of impugned judgment in the terms mentioned in supra para, hence this appeal.

7. Learned counsel for the appellant contends that the appellant is innocent. He has been falsely involved by the police in the instant case on the basis of previous enmity. There are glaring contradictions between the statements of PW-2 & 4, relating to association of the present appellant and recovery proceedings. Statement of one PW negates the contention of other witness, whereas the learned trial Court ignored the material aspect of the case on the basis whereof the impugned judgment is not sustainable. Further contended that the alleged place of recovery Sweet Mart General Store Athal is situated in a thickly populated area and no private person was associated during recovery proceedings. Learned counsel further submits that the appellant/convict is previously non-convict and non-record holder. Lastly prayed for setting aside of the impugned judgment.

8. On the other hand, learned State Counsel opposed the contentions raised by the learned counsel for the appellant/convict and contended that the learned trial Court has rightly convicted the appellant on the basis of corroborative and convincing evidence and material produced by the prosecution. He further contended that the impugned judgment does not suffer from any infirmity or illegality,

which may invite interference by this Court. Lastly, he urged for the dismissal of the instant appeal.

9. We have heard the arguments of the learned counsels for the parties and have perused the available record with their able assistance.

10. Perusal of the record reveals that according to prosecution case an accused namely, Faizan Anjum was arrested in F.I.R No.83/2011 under Section 9 (b) of the Control of Narcotic Substances Act, 1997 from whom 120 grams Charas was recovered, who disclosed to the police that he purchased the recovered Chars from proprietor of Sweet Mart General Store Athal. Appellant/convict and his father Muhammad Riaz were arrested by the police party headed by Jamshed Khan-Sub-Inspector, who conducted raid at the said store of the appellant and allegedly recovered 2000 grams Chars Garda from the possession of appellant contained in a shopping bag carried by him. The prosecution produced Ejaz Ahmed-A.S.I. as PW-2, who stated that in his presence Chars P-1 was recovered from the possession of the appellant vide recovery memo Exh.PA. During cross examination, he has stated that the above said accused Faizan Anjum was taken to Police Station by PW-4, Jamshaid Khan S.I. and was arrested in between 3/4 p.m. on 21.03.2014. Thereafter, he was taken to Police Station and continuously kept in Police Station Bhara Kahu for three hours. This deposition of PW-2 contradicts the statement of PW-4. PW-4 in cross-examination has replied that the above named Faizan Anjum was arrested on 21.03.2011 at about 6:00 pm, who was interrogated at the spot, on his disclosure, he was taken directly to Sweet Mart General Store Athal. The copy of F.I.R No.83/2011 registered against the above said Faizan Anjum is annexed at page

No.73 of the paper book, wherein the time of occurrence has been mentioned as 05:30 pm. It has come in evidence that on the spot accused Faizan Anjum was interrogated for almost 1-1/2 hours and then was brought to Police Station Bhara Kahu, where he was kept for three hours and then was taken from the Police Station to the Sweet Mart General Store Athal, which consumed 15/20 minutes, in such circumstances, the F.I.R. against the appellant/convict should have been registered at about 10:20 pm.

11. If we read the above-discussed portion of testimony of PW-2 in juxtaposition to the testimony of PW-4, there are glaring contradictions and discrepancies, which are enough to raise question on the veracity of prosecution case. Reliance in this regard is placed on the judgment titled as "*Minhaj Khan versus The State*" (**2019 SCMR 326**). Another significant contradiction was that the PW-2 in his examination-in-chief has clearly stated that on the search of black shopping bag Chars weighing 2010 grams was recovered whilst surprisingly in the F.I.R recovery of 2000 grams Chars alleged to have been made. The case of prosecution was that Chars Garda was recovered from the possession of appellant, but astonishingly, PW- 4 in cross-examination, has replied that the recovered material was in separate pieces, having equal dimensions. Here another question arises that if the statement of this witness is believed to be correct then the weight of each piece was not described and admittedly, sample from each separate piece has not been taken for the purpose of chemical analysis. The Hon'ble Supreme Court of Pakistan in the judgment "*Ameer Zeb...vs...The State*" (**PLD 2012 SC 380**) held that:-

"It is our considered opinion that a sample taken of a recovered substance must be a representative sample of the entire substance recovered and if no sample is taken from any

particular packet/cake/slab or if different samples taken from different packets/cakes/slabs are not kept separately for their separate analysis by the Chemical Examiner then the sample would not be a representative sample and it would be unsafe to rely on the mere word of mouth of the prosecution witnesses regarding the substance of which no sample has been taken or tested being narcotic substance.”

12. As per statement of PW-1 that on the very next day, he handed over one parcel to Constable Sajid Raza for onward transmission to the chemical examiner, Rawalpindi, meaning thereby that on 22.03.2011, he had handed over the parcel to the said Sajid Raza but the report of chemical examiner Exh.PF shows that it was received on 24.03.2011 to the office of Chemical Examiner. The said witness namely, Sajid Raza was not produced as a witness before the learned trial Court to ascertain that when the samples were delivered to him for its transmission to FSL and during the intervening period whether the same were in safe custody and its transmission to FSL was safe, as such, the safe custody of the contraband from the local Police Station to the office of Chemical Examiner has not been proved by the prosecution. The non-production of said Sajid Raza as PW, has rendered the prosecution case doubtful whether the samples were safely transported/transmitted to the office of Chemical Examiner and that no tampering was committed or otherwise. The chain of custody for safe transmission is missing, which creates serious doubt in the prosecution case. The Apex Supreme Court of Pakistan in the judgment titled as “*Haji Nawaz vs. State*” **[2020 SCMR 687]** observed that in absence of any proof regarding safe custody or safe transmission of the recovered substance or the sample thereof a conviction cannot be recorded in a case of such nature.

13. The Hon'ble Supreme Court of Pakistan has already held in the cases titled as 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 sample of the recovered substance is not proved by the prosecution through any independent evidence, it cannot be presumed with any degree of confidence that the prosecution had succeeded in proving its case against the appellant beyond shadow of reasonable doubt, as such in the instant case, the safe transmission of contraband was not proved. Reliance in this regard is placed on the judgment passed by August Supreme Court of Pakistan in Criminal Appeal No.579 of 2017, titled as Siraj-ud-Din vs. the State. For facilitation, the relevant portion is reproduced hereunder.-

“According to the prosecution different types of narcotic substances had been recovered in this case which were contained in different packets stored in different sacks. The recovery witness namely Sepoy Zain-ul-Haq (PW2) and the investigating officer namely Inayat Ullah Sheikh (PW-3) had stated before the trial court in so many words that they did not know how many packets were contained in every sack recovered in this case. The sacks allegedly recovered in this case were opened before the trial court during the trial and the trial court had found that the said sacks were not sealed. Safe custody of the recovered substances had not been proved in this case inasmuch as according to the prosecution the recovered substances were kept for safe custody in a warehouse but nobody from the said warehouse had been produced before the trial court in order to vouch for safe custody of the recovered substances. Even safe transmission of the samples of the recovered substances had not been proved in this case. According to the report of the Forensic Science Laboratory the samples had been brought to the Forensic Science Laboratory by one Sagheer Ahmed but no person by the name of Sagheer Ahmed had been produced before the trial court so as to confirm that the samples had remained in his custody quite safe while transmitting the said samples to the Forensic Science Laboratory. As if this were not enough, the protocols of the tests applied on the samples of the recovered substances had not been mentioned in the report of the Forensic Science Laboratory brought on the record of the trial court.”

14. The discrepancies in the testimonies of the two witnesses, the non-production of Constable Sajid Raza for proof of the safe

transmission of the parcel to the office of Chemical Examiner and non-separation of samples from each piece are matters of concern and collectively incredulity. The conclusion therefrom we draw is that the prosecution has failed to establish case against the appellant beyond reasonable doubt.

15. For the forgoing reasons, we are of the considered opinion that there are material contradictions in the statements of prosecution witnesses, which has rendered the case highly doubtful. Further, the safe transmission of the alleged recovered contraband was also not established as such, the instant appeal is **allowed** and the impugned judgment, dated 26.04.2014 passed by learned Additional Sessions Judge, Islamabad (East) is hereby **set-aside**. Consequently, the appellant/convict namely, Nizabat Mehmood S/o Muhammad Riaz is **acquitted** of the charge. He is on bail, his surety is discharged from his liabilities.

(CHIEF JUSTICE)

**(GHULAM AZAM QAMBRANI)
JUDGE**

Announced in open Court on this 30th day of July, 2020.

JUDGE

JUDGE

*Rana. M. Ift **

Approved for reporting