

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

(1) Criminal Appeal No. 114/2020

Muhammad Nafees
Versus
The State

(2) Criminal Appeal No. 124/2020

Muhammad Kashif
Versus
The State
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Appellant by:	Mr. Irfan Hussain, Advocate in Crl. Appeal No.114/2020. Mr. Shan Zeb Khan, Advocate in Crl. Appeal No.124/2020.
Respondent by:	Dr.Waseem Ahmad Qureshi, Special Prosecutor ANF along with M. Sheraz, Inspector.
Date of Hearing:	<u>07.10.2020.</u>

FIAZ AHMAD ANJUM JANDRAN, J.- The instant criminal appeals under Section 48 of the Control of Narcotics Substances Act, 1997 ("**Act of 1997**"), are directed against the judgment dated 15.05.2020 passed by the learned Judge, Special Court (CNS), Islamabad, whereby the appellants were convicted under Section 9/C and 15 of the Act of 1997, and sentenced to undergo 06 years and 06 months rigorous imprisonment (R.I) with fine of Rs.30,000/-, each, in default to pay the amount of fine, to further undergo simple imprisonment (S.I) for 05 months, each in case FIR No.65, dated 15.05.2018, under Section 9/C and 15 of the Act of 1997, Police Station ANF, RD North, Rawalpindi. The benefit of Section 382-B of Cr.P.C was also extended to the appellants.

2. Briefly, the accusation against the appellants in the complaint Ex.PA/1, on the basis of which FIR No.65, Ex.PA was registered is that on 15.05.2018 at about 06:45 A.M, Hassan Feroz SI, ANF/I.O./PW-4 was present at P.S. ANF RD North Rawalpindi when received an information that the appellants, handlers of drug paddler Naveed had to come for the supply of huge quantity of Charas at Motorcycle No.APP-969 near Gloria Jean's F-11, Markaz, Islamabad. On the said information SI/PW-4 along with other officials namely Riazat, Ejaz, Farooq and Shahid Iqbal at about 7:30 a.m. intercepted the said Motorcycle being driven by appellant Muhammad Kashif while appellant Muhammad Nafees was a pillion passenger. S.I./I.O. conducted search of both the appellants and recovered 1800 grams charas from the possession of appellant Kashif, which was in the shape of two packets, wrapped in brown colour (khaki) insulation tape from his right and left pockets while 1500 grams charas was recovered from appellant Muhammad Nafees from right pocket of his shirt. Small quantity of 10 grams was separated from each packet and sealed into separate parcels for the purpose of Chemical Examination. The remaining substance was also sealed into two seals parcels and the S.I./PW-4 took all the five parcels in his possession along with personal belonging of both the appellants through two recovery memos Ex.P-C and Ex.P-D respectively. SI/IO then drafted complaint Ex.PA/1 and sent the same to the Police Station for registration of FIR.

3. The Investigating Officer (I.O)/PW-4 then recorded the statements of the witnesses and on return to the Police Station handed over the case property to the Moharrir Malkhana for its safe custody. On 16.05.2018 he dispatched sample parcels to the N.I.H Laboratory through constable Ejaz, on 18.05.2018 sent the appellant to judicial custody and on receipt of N.I.H reports,

Ex.PG, PH, and PJ, submitted supplementary challan in the Court of learned Judge Special Court (C.N.S.), Islamabad, where the appellants were formally charge sheeted to which they pleaded not guilty and claimed to be tried.

4. At the trial, prosecution examined Rawaiz Khan HC ANF RD North Rawalpindi as PW-1 who on 15.05.2018 drafted formal FIR Ex.PA. PW-2 Muhammad Ejaz Constable on 16.05.2018 deposited three sealed sample parcels in the N.I.H Islamabad after receiving the same from Muhammad Ilyas Moharrir Mallkahna on very day. PW-3 constable Muhammad Ilyas, on 15.05.2018. kept the case property of this case comprising five sealed parcels, Honda Motorcycle, key and other articles which were handed over to him by SI/I.O. PW-4 Hassan Feroz S.I. is the Investigating Officer of this case, who deposed to prove the apprehension of appellants, their search, recovery of charas, and other proceedings, highlighted above. PW-5 Shahid Iqbal constable also deposed to prove the recovery proceedings besides the two recovery memos Ex.PC and Ex.PD respectively.

5. Learned counsel for the appellants in their respective submissions argued that the prosecution evidence contains material discrepancies which renders its veracity doubtful; that the sample parcels as per report of N.I.H was deposited with a delay of one day; that the appellants were held responsible for having joint possession, no witness from the public has been associated with the recovery proceedings, therefore, impugned judgment and conviction are liable to be set aside.

6. On the other hand, learned Prosecutor-ANF stands behind the judgment by certifying the fact that previously no case had been registered against the appellant.

7. We have heard the learned counsels for the appellants, learned Prosecutor-ANF and have gone through the record.

8. The main emphasis of the learned counsel for the appellants had been on the point that the prosecution has failed to establish safe transmission of the sealed sample parcels in the office of N.I.H.

9. It is noticed that PW-2 Muhammad Ijaz constable in his statement maintained that on 16.05.2018, he received three samples sealed parcels from the Moharrir Malkhana Muhammad Ilyas PW-3 and deposited the same in the N.I.H Islamabad. Likewise, PW-4 Hassan Feroz S.I/I.O. deposed that he sent the sample parcels to N.I.H through Muhammad Ijaz constable on 16.05.2020, while the report of N.I.H, Ex-PG, speaks otherwise as the date of receipt of the parcels in the said report is mentioned as 17.05.2018. It is an admitted fact that the prosecution, throughout the trial did not question the said entry in Ex.PG rather relied upon the report to substantiate that the recovered substance was charas that can be used to cause intoxication. Therefore, the safe transmission of the sample parcels from the malkhana to its receipt in the N.I.H. has not been substantiated. It is necessary to highlight that proving unbroken chain of safe transmission of the sample parcels is necessary for conviction in narcotic cases because the recovery is not just a corroboratory piece of evidence, rather constitutes the charge having punishment and if said unbroken chain of safe custody has not been established, it would be considered grave and fatal for the prosecution case. The prosecution has to prove safe custody from the point of recovery, till its submission by way of samples to the Laboratory.

10. The Hon'ble Apex Court in "**The State through Regional Director ANF v. Imam Bakhsh**" (2018 SCMR 2039)

has held that ***"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. 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, would casts doubts on the safe custody and safe transmission of the sample(s) and would impair and vitiate the conclusiveness and reliability of the report of the government analyst, thus, rendering it incapable of sustaining conviction."***

11. The Hon'ble Apex Court in **"Abdul Ghani and others v. The State"** (2019 SCMR 608) acquitted the accused by extending the benefit of doubt on the ground of broken chain of safe transmission of the sample by observing 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 Malkhana 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]

12. Moreover, the same course was followed by this Court ***while deciding criminal appeal No.202/2019, vide judgment dated 17.10.2019 whereby the accused was acquitted on the basis of delay of one day in the deposit of sample in the N.I.H. after receiving the same from malkhana.***

13. Despite careful examination of the record, no document could be found, which could suggest that any case/question was to put to any of the officials of the N.I.H that they have incorrectly mentioned the date of receipt of sample as 17.05.2018 instead of 16.05.2018. The role of the prosecution requires great responsibility and prosecution has to prove its case beyond any reasonable doubt on every important aspect. The preservation of separated samples from recovered drug and its safe transmission to the Malkhana and onward deposit in the office of Chemical Examiner for report without any flaw is most important phenomena in the narcotic cases. Said requirement is so

mandatory, that the Hon'ble Apex Court in the case law (*supra*) has used the word "must" instead of "may" or "shall".

14. Having examined the case from all angles, it is held that the case of the appellants entail altogether identical facts whereby the prosecution has failed to establish the unbroken chain of transmission of sealed sample parcels to the office of N.I.H, therefore, appellants deserve the same treatment.

15. In view of above, instant criminal appeals are **allowed**, impugned conviction and sentence awarded to the appellants vide judgment dated 15.05.2020 are set aside. They are acquitted of the charges by extending benefit of doubt and shall be released forthwith if not required in any other case.

(MOHSIN AKHTAR KAYANI) (FIAZ AHMAD ANJUM JANDRAN)
JUDGE JUDGE

A.R. ANSARI

Announced in open Court on 25-11-2020.

JUDGE

JUDGE

Approved for reporting.