

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

Crl. Appeal No.203/2008

Qamar Masih Versus The State

JUDGMENT

Date of hearing:	<u>09.10.2024</u>
Appellant by:	Mr. Muhammad Javed Iqbal Qureshi, Advocate along with the appellant (on bail).
State by:	Mr. Haroon Rasheed, Deputy Prosecutor General along with Waris, S.I.

Farooq Haider, J.:- This appeal has been filed against the judgment dated: 28.06.2007 passed by learned Additional Sessions Judge, Sialkot whereby in case arising out of F.I.R No.67/2006 dated: 05.02.2006 registered under Section: 9 (c) of the Control of Narcotic Substances Act, 1997 at Police Station: Civil Lines, District Sialkot, trial court has convicted and sentenced the appellant as under:-

under Section 9(c) of Control of Narcotic Substances Act, 1997 to Rigorous Imprisonment for 14-years with fine of Rs.500,000/- 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.DA) sent by Muhammad Arshad, S.I. (complainant/PW-1) is that on 05.02.2006, he (complainant/PW-1) was present at Bara Pathar Chowk for searching proclaimed offenders, narcotics sellers; police officials on patrol duty in the area also met him; in the meanwhile a spy information was received that Qamar Masih son of Yousaf Masih resident of Landi Kotal along with his wife namely Sheela, who usually come from their residence situated at Christian Colony Adha and sell narcotics, after sending Humayoun alias Chand to inform customers and bringing charas tied in bundle type cloth (گھٹری نما کپڑا) for sale purpose is standing; if a raid is immediately conducted, he could be apprehended from near Church Chowk Qabristan; upon such information, they immediately after constituting raiding team, reached at the spot, a person whose name was disclosed as Qamar son of Yousaf, resident of Landi Kotal (mentioned above) was carrying charas tied in floral ladies chaddar and besides him, one woman whose name was disclosed as Sheela wife of Qamar was also present; on search of bundle carried by Qamar in his hand, golden coloured packet having English text

“CHOCO CAPPUCCINO” containing 09-packs/slabs of charas (total weighing 09-Kg and 60-grams) was found; on his personal search, black coloured Motorola mobile C-115 and a currency note of Rs.50/- were recovered, which were taken into possession; recovered charas was sealed into 08-parcels with stamp of H.C. and taken into possession; he also confessed regarding taking of charas from Landi Kotal, keeping the same with his in-laws Christian Colony Adha and while taking his wife namely Sheela along with him, selling the same to his customers on different occasions.

After investigation, challan report was sent to the Court against the appellant; charge was framed against him, to which he pleaded not guilty; prosecution produced its evidence. Trial court recorded statement of the appellant under Section: 342 Cr.P.C. wherein he refuted allegations leveled against him; he did not opt to appear as his own witness under Section 340(2) Cr.P.C. to disprove the allegations levelled against him, however, produced Ashiq Masih as DW-1, Muhammad Iqbal Javaid as DW-2, copy of report prepared under Section: 173 Cr.P.C. in case arising out of FIR No.682/2006 along with proceedings and evidence etc. as Exh.DD, copy of FIR No.68/2006 registered at Police Station: Civil Lines as Exh.DE and copy of FIR No.69/2006 registered at Police Station: Civil Lines as Exh.DF in his defence evidence. Trial court after conclusion of trial has convicted and sentenced the appellant as mentioned above through impugned judgment.

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 has supported the impugned judgment and requested for dismissal of this appeal.

5. After hearing learned counsel for the appellant, learned Deputy Prosecutor General and going through the record, it has been noticed that as per case of prosecution, parcel of entire statedly recovered charas was sent to the office of Chemical Examiner, Punjab Lahore and in this regard, report of Chemical Examiner, Punjab Lahore is available on the record as Ex.PF; perusal of said report reveals that packet in this case was dispatched on 08.02.2006 from Excise and

Taxation Officer (E.T.O.), Sialkot *vide* letter No.734 dated: 08.02.2006 however learned Deputy Prosecutor General after going through the record could not refer even an iota of material/evidence to show that when packet containing statedly recovered charas in this case was sent to the office of Excise and Taxation Officer, Sialkot, who took the same there and who collected it from there for submitting the same to the office of Chemical Examiner. It is relevant to mention here that Shafaqat Ali, 940/C while appearing as PW-2 categorically deposed before the court that on 14.02.2006, Muhammad Latif, 1475/HC (Moharrar of the police station) handed over to him one sealed parcel, which he deposited in the office of Chemical Examiner, Lahore. He has not stated that said parcel was at any time taken to Excise and Taxation Officer, Sialkot or was collected by him from Excise and Taxation Officer, Sialkot for depositing the same in the office of Chemical Examiner. Similarly, Muhammad Latif, 1475/HC (Moharrar of the police station) while appearing before the court as PW-3 stated that Munawar Khan, S.I.(PW-4) handed over parcel to him on 05.02.2006 and he handed over the same on 14.02.2006 to Shafaqat Ali, 940/C (PW-2) for its onward transmission to the office of Chemical Examiner, Lahore and he did not depose that said sealed parcel was ever sent to Excise and Taxation Officer, Sialkot or was received from the office of Excise and Taxation Officer, Sialkot.

This aspect has impaired and vitiated the conclusiveness and reliability of the report of Chemical Examiner, Punjab Lahore; in this regard, case of “**MUHAMMAD ABBAS vs. THE STATE**” (2006 YLR 2378)[Lahore], can be referred advantageously, relevant portion whereof is being reproduced below:

“The report of the Chemical Examiner (Exhibit-PE), however, shows that the docket of the samples of the recovered substance had been prepared on 06.07.1998 and the said samples had been dispatched by the Excise and Taxation Officer, Sheikhpura and not by the local police. We have required the learned counsel for the State to explain as to how the samples of the recovered substance had come in the hands of the Excise and Taxation Officer, Sheikhpura and what was the evidence available on the record to confirm that the same had been kept in safe custody while in possession of the Excise and Taxation Officer, Sheikhpura but after going through the record of this case from cover to cover he has categorically conceded that there is no evidence whatsoever available on the record in those respects. In such a state of the evidence available on the record safe custody of the recovered substance or its samples is not discernable from the record of this case and, thus, we have found it to be extremely unsafe to

uphold and maintain the appellant's convictions and sentences recorded by the learned trial court."

Unreported judgment of Division Bench of this Court rendered in the case of "**Munawar Hussain Vs. The State, etc.**" (**Crl. Appeal No.364-J of 2014**) dated: 16.01.2019 can also be safely referred on the subject.

Furthermore, Munawar Khan, S.I. while appearing in the witness box as PW-4 categorically stated regarding availability of case property i.e. P-1/1-9 in the court at the time of recording of evidence; in this regard, relevant portion of his statement is hereby reproduced as under:-

"The alleged recovered 9 packets of chars P-1/1-9 was taken into possession vide recovery memo Ex.P.B---."

Similarly, Ghulam Rasool, ASI while appearing in the court as PW-5 also deposed regarding availability of parcel of case property in the court as P-1 at the time of recording of his evidence; in this regard, relevant portion of his statement reads as under:-

"On the same day, Munawar Khan SHO/SI alongwith other police officials recovered charas P.1 from the accused Qamer Masih present in the court in my presence."

It is relevant to mention here that as per own case of prosecution, entire case property in this case was sent to the office of Chemical Examiner for analysis, however, prosecution did not produce any evidence to show that who and when brought it back from said office for production of the same before the court at the time of recording of evidence during trial of the case.

Therefore, safe custody and transmission of parcel of case property from police station to the office of Chemical Examiner, Punjab Lahore and then to court has not been proved in this case. 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.

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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, case of “**ABDUL GHANI and others versus The STATE and others**” (2019 SCMR 608) can also be referred; 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 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)

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 and transmission of parcel of case property from police station to the office of Chemical Examiner, Punjab Lahore and then to the court has not been proved in this case therefore report of Chemical Examiner (Ex.PF) has lost its conclusiveness and cannot be made basis for conviction. By now it is also well settled that if safe custody of allegedly recovered substance/ case property has not been proved then, there is no need to discuss other merits of the case and it straightaway 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”**.

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. Nutshell 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 Qamar Masih (appellant) through the impugned judgment dated: 28.06.2007 passed in case arising out of F.I.R No.67/2006 dated: 05.02.2006 registered under Section: 9 (c) of the Control of Narcotic Substances Act, 1997 at Police Station: Civil Lines, District Sialkot, are hereby set aside. The appellant is on bail after

suspension of execution of his sentence by this Court *vide* order dated: 06.07.2011 passed in Crl. Misc. No.02 of 2011, his sureties are discharged from the liabilities of bail bonds.

(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 09.10.2024 whereas after preparation, signed on 10.10.2024.

Asif