

21/22

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

MR. JUSTICE SARDAR TARIQ MASOOD
MR. JUSTICE SAYYED MAZAHAR ALI AKBAR NAQVI
MR. JUSTICE JAMAL KHAN MANDOKHAIL

(AFR)

Jail Petition No. 42 of 2017

(On appeal from the judgment of the Peshawar High Court, Mingora Bench (Dar ul Qaza) Swat dated 19.12.2016 passed in Cr. A. No. 231-M of 2014)

Zafar Khan & another

Petitioner(s)

Versus

The State

.....Respondent(s)

For the Petitioner:

Mr. Arshad Hussain
Yousafzai, ASC

For the State:

Mr. Zahid Yousaf Qureshi,
Addl. AG KP

Date of hearing:

11.02.2022

ORDER

Jamal Khan Mandokhail, J.- The prosecution case against the petitioners is that a vehicle was intercepted, which was being driven by petitioner Zafar Khan and Taj Mir Khan was sitting on the front seat. On search of the vehicle, secret cavities beneath the switch board were surfaced, wherefrom 25 packets of alleged *Charas*, each packet weighed one kilogram, wrapped in black coloured plastic were found. The complainant Bakht Rehman, ASI recovered the material through a recovery memo (Ex.PW4/1). Out of each packet, five grams of *Charas* was separated for the purpose of chemical examination and packed in separate parcels and the rest were packed in another parcel. The complainant sent a complaint to the police station, on the basis whereof, the case FIR No. 272 dated 06.03.2014 registered under section 9(c) of the Control of Narcotic Substances Act, 1997 (**CNSA**) at Police Station Ghaligai, District Swat against the petitioners. The Trial Court

convicted the petitioners under section 9(c) of the CNSA and sentenced them to imprisonment for life, with fine of Rs.500,000/- each, in default whereof to undergo SI for six months. Benefit of section 382-B, Cr.P.C. was extended to them. Feeling aggrieved, the petitioners filed a criminal appeal before the Peshawar High Court, Mingora Bench (Dar ul Qaza), Swat, which stands dismissed, hence, the instant jail petition for leave to appeal.

2. Heard the learned counsel for the parties and perused the record. In the cases of narcotic substances, recovery memo is a basic document, which should be prepared by the Seizing Officer, at the time of the recovered articles, containing a list thereof, in presence of two or more respectable witnesses and memo to be signed by such witnesses. The main object of preparing the recovery memo at the spot and with signatures of the witnesses is to ensure that the recovery is effected in presence of the marginal witnesses, honestly and fairly, so as to exclude the possibility of false implication and fabrication. Once the recovery memo is prepared, the next step for the prosecution is to produce the same before the Trial Court, to prove the recovery of the material and preparation of the memo through the Scribe and the marginal witnesses. The complainant when appeared as PW4 before the Trial Court, though stated that the contraband material was taken into possession through the recovery memo Ex.PW.4/1, but did not mention the name of the witnesses in whose presence, the recovery memo was prepared nor did he mention their signatures upon it. However, Rehmat Ali, Head Constable who appeared as PW5, claimed to be the recovery witness and contended that he signed the recovery memo, but did not give details about the document, which he claims to have signed nor produced the same in the Court. He did not refer the one, which was produced by the complainant. Even, PW5 was not confronted with the Ex.PW4/1 at the time of recording his statement to confirm the contents of the same and his signatures upon it. The complainant and the only witness of the recovery do not corroborate each other on material points, therefore, their statements do not inspire confidence about the reliability of the recovery memo (Ex.PW4/1), as such, the

prosecution has not been able to establish the recovery of the contraband material from the petitioners.

3. Besides, the complainant alleged that beneath the switch board of the vehicle, secret cavities were found. To the contrary, PW5 who claimed to be the recovery witness, stated before the Trial Court that one packet of *Charas* was recovered from beneath the switch board and upon opening the switch board, secret cavities were found there and the remaining packets were recovered therefrom. It has also come on the record that there was a space only for the air conditioner under the switch board, wherefrom the recovery of *Charas* has been alleged. The witnesses are not certain about the exact location of the cavities and recovery of the contraband material therefrom. It is also important to mention here that the complainant did not say about the signatures or identification mark of any of the recovery witness upon any parcel allegedly prepared at the place of the occurrence. The only recovery witness i.e. PW5 also did not utter a single word with regard to the preparation of the parcels of the contraband material in his presence at the spot nor did he mention signing or putting mark of identification upon any of the parcels. It shows that if any parcel was prepared by the complainant, it was not witnessed by the recovery witness. Under such circumstances, it is not safe to believe that the material contained in these parcels, relied upon by the complainant is the same, which was alleged to have been recovered from the petitioners.

4. Moreover, the complainant and rest of the witnesses did not say anything about the custody of the parcels of the contraband. The complainant in his cross examination, replied that the recovered material remained at the place of the occurrence for about 45 minutes, whereafter, he handed it over to a *Moharrar*, present at the check post near the place of the occurrence, but did not mention name of the said *Moharrar* nor explained as to what happened to the parcels thereafter. Admittedly, the prosecution did not produce the *Moharrar* to whom the contraband was allegedly handed over, nor has it come on the record as to whether the same was deposited in the *Malkhana*. The witness did not explain as to

where the contraband material and the samples separated for chemical analysis were lying before sending the same to the office of the FSL. According to the complainant, he sent the sample of the contraband material for chemical analysis through an application (Ex.PA/1) but did not explain as to when he sent the same. Perusal of the application (Ex.PA/1) would reveal that it was written on 6th of March, 2014, but the report of the chemical expert reveals that the contraband material was received on 10th of March, 2014. Even the person who delivered the sample to the office of Chemical Examiner, has not been produced to prove the contention of the complainant with regard to sending of the samples. The period between 6th March 2014 when according to the complainant, the samples were sent and till its receipt by the FSL on 10th March 2014 remained unexplained. It is the responsibility of the prosecution to establish safe custody of the recovered material and immediate transmission of its samples to the examiner to avoid any possibility of substitution. The complainant did not give any reason for sending the samples to the office of the FSL after the delay of four days, therefore, it cannot be said with certainty that the samples which were sent for chemical examination, were actually the same, which were alleged to have been recovered from the petitioners. Thus, it is evident that the alleged recovered contraband material, including the pieces deducted for the purpose of chemical analysis were not in a safe custody and transmission of the samples to the examiner was doubtful, as such, possibility of its tampering cannot be ruled out.

5. Keeping in view the gravity of the punishment provided under section 9(c) of the CNSA, it is the bounden duty of the prosecution to prove the recovery of contraband material from the accused, its safe custody and sending the samples for chemical analysis without undue delay. In this case, the needful has not been done. In this behalf, reference to the cases of **Imam Bakhsh¹, Mst. Razia Sultana², Zahir Shah³, and Mst. Sakina Ramzan⁴** is in order. The Courts below have failed to appreciate

¹ 2018 SCMR 2039

² 2019 SCMR 1300

³ 2019 SCMR 2004

⁴ 2021 SCMR 451

the stated facts, the evidence, the relevant law and the guidelines highlighted by this Court in the referred judgments, which is an illegality. The judgments impugned are, therefore, not sustainable.

Thus, for the foregoing reasons, this jail petition is converted into an appeal and is hereby allowed. The convictions and sentences of appellants Zafar Khan and Taj Mir Khan awarded through the impugned judgments dated 18.09.2014 and 19.12.2016 passed by the Trial Court and the learned High Court respectively, are set aside. They are acquitted of the charge and be released forthwith, if not required to be detained in any other case.

Islamabad,
11.02.2022

Approved For Reporting

K.Anees/-