

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Sardar Tariq Masood
Mr. Justice Mazhar Alam Khan Miankhel
Mr. Justice Amun-ud-Din Khan

AOR

JAIL PETITION NO. 587 OF 2016
A/W. CRL. S.M.R.P. NO. 14 OF 2022

(On appeal against the judgment dated 11.11.2014 of the Peshawar High Court, Peshawar passed in J Cr A. No. 343 P/2012)

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|----------------------------------|---|--------------------|
| Qaisar Muhammad Zareef Bhatti | (JP No. 587 of 2016) (Crl.S.M.R.P. No.447 of 2022) | Petitioners |
| Versus | | |
| The State | (in both petitions) | Respondents |

For the petitioner:

(JP No. 587 of 2016)

Mr. Arshad Hussain Shah, AOR
Mr. Zulfiqar Khalid Maluka, ASC

(Crl. S.M.R.P. No. 447 of 2022): Not represented

For the State:

Mr. Shumayl Aziz, Addl.A.G., KPK

Date of hearing

02.06.2022

ORDER

SARDAR TARIQ MASOOD, J.

Crl. M.A. No. 1767 of 2016

For reason mentioned in instant application for condonation of delay, the same is allowed and the delay of 699 days in filing of the petition is condoned.

Jail Petition No. 587 of 2016

2. Petitioner Qaiser alongwith Muhammad Zareef Bhatti was indicted in case FIR No.333 dated 19.08.2011 registered under section 9 (c) of the Control of Narcotic Substances Act, 1997 (**Act, 1997**) at police station University Town, Peshawar. After conclusion of trial, learned trial court vide judgment dated 21.06.2012 convicted the petitioner and his co-accused Muhammad Zareef Bhatti, under section 9 (c) of the Act, 1997 and sentenced each of them to imprisonment for life with fine of Rs.25,000/- or in default of payment of fine to further undergo six months simple imprisonment. Benefit of section 382-B

Cr.P.C. was also extended to him. Being aggrieved, petitioner and Muhammad Zareef Bhatti filed appeals before the Peshawar High Court, Peshawar which were dismissed vide impugned judgment dated 11.11.2014. Hence, this petition for leave to appeal by the petitioner Qaiser through jail.

3. We have heard the learned counsel for the petitioner as well as the learned Additional Advocate General. KPK and perused the available record alongwith the impugned judgment with their assistance and observed that in this case the prosecution has failed to establish the safe custody and safe transmission of sample parcels to the concerned laboratory. This court had laid down in many judgments that the representative samples of the alleged drug must be kept in safe custody and undergo safe transmission from the stage of recovery till its submission to the office of the Government analyst. Non establishing the said facts would cast doubt and would impair and vitiate the conclusiveness and reliability of the report of the Government analyst. Thus rendering it incapable of sustaining conviction.

4. In the present case no police official was produced before the Trial Court to report about safe custody of samples if entrusted to him for being kept in the *Malkhana* in safe custody. Even the police official whose belt number (FC 4225) has been mentioned by the Government analyst in his report, was not produced by the prosecution to depose regarding the safe deposit of the said sample parcels in the concerned laboratory. The record reveals that the recovery was allegedly effected on 19.08.2011 whereas, according to the report of chemical examiner, the sample parcels were received in the said office on 26.08.2011. Nobody from the prosecution side was produced to claim that during this period the said sample parcels remained intact in his possession or under his control in the *Malkhana* in safe custody. Even the prosecution is silent as to where remained these sample parcels from 19.08.2011 to 26.08.2011. In absence of establishing the safe custody and safe transmission, the element of tempering cannot be excluded in this case. The chain of custody of sample parcels begins from the recovery of the narcotics by the police including the separation of representative samples of the recovered narcotics, their dispatch to the *Malkhana* and further dispatch to the testing laboratory. The said chain of custody and transmission was pivotal as the entire construct of the

Act 1997 and the Control of Narcotic Substances (Government Analysts) Rules 2001 (**Rules 2001**), rests upon the report of the analyst. It is prosecution's bounded duty that such chain of custody must be safe and secure because the report of chemical examiner enjoined critical importance under the Act 1997, and the chain of custody ensure the reaching of correct representative samples to the office of chemical examiner. Any break in the chain of custody i.e. the safe custody or safe transmission of the representative samples, makes the report of chemical examiner worthless and un-reliable for justifying conviction of the accused. Such laps on the part of the prosecution would cast doubt and would vitiate the conclusiveness and reliability of the report of chemical examiner. Reliance can be made upon the judgments rendered by three members benches of this court i.e. **Ikramullah v. the State** (2015 SCMR 1002), **the State v. Imam Bakhsh** (2018 SCMR 2039), **Abdul Ghani v. the State** (2019 SCMR 608), **Kamran Shah v. the State** (2019 SCMR 1217), **Mst. Razia Sultana v. the State** (2019 SCMR 1300), **Faizan Ali v. the State** (2019 SCMR 1649), **Zahir Shah alias Shat v. State thr. AG KPK** (2019 SCMR 2004), **Haji Nawaz v. the State** (2020 SCMR 687), **Qaiser Khan v. the State** (2021 SCMR 363), **Mst. Sakina Ramzan v. the State** (2021 SCMR 451), **Zubair Khan v. the State** (2021 SCMR 492) and **Gulzar v. the State** (2021 SCMR 380).

5 Although the learned Additional Advocate General, KPK tried to persuade us for deviation from the earlier judgments but it is quite clear from the judgments of this Court that 3-Members Bench remained unanimous that the prosecution is required to prove the safe custody and safe transmission of the sample parcels. It is now established that the decision of a bench of certain member of judges is binding on the subsequent bench of the same strength and if a subsequent bench of the same strength wants to take a different view the only possibility is to refer the matter to the Chief Justice of Pakistan for the constitution of a larger bench, even a decision of a bench of equal strength is not brought into the notice of a subsequent bench of same strength and it expresses a contrary view, then the later decision is a judgment per incuriam.

6. In the case of **Mst. Samrana Nawaz v. M.C.B. Bank Ltd.** (PLD 2021 SC 581) it was held that earlier judgment of a Bench of the Supreme Court was binding not only upon the Benches of smaller

numeric strength but also upon the Benches of co-equal strength; a Bench of co-equal strength could not deviate from the view held by an earlier Bench, and if a contrary view had to be taken, then the proper course was to request the Chief Justice of the Supreme Court for constitution of a larger Bench to reconsider the earlier view. Smaller Bench cannot request for the constitution of a larger Bench to revisit the opinion of a larger Bench on any question or principle of law. View expressed by a three member Bench of the Supreme Court could only be changed or deviated, from a Bench of equal number for which the forum provided by law was to request the Chief Justice for constitution of a larger Bench. In the cases of Multiline Associates v. Ardeshir Cowasjee (PLD 1995 SC 423) and Wak Limited Multan Road, Lahore v. Collector Central Excise and Sales Tax, Lahore (now Commissioner Inland Revenue, LTU, Lahore) (2018 SCMR 1474) it was held that earlier judgment of equal Bench of the High Court on the same point was binding on the subsequent Bench and if the subsequent Bench tended to take a different view, it had to request for the constitution of larger Bench. In the case of Union of India & others v. S.K. Kapoor [(2011) 4 SCC 589] it was held that if a subsequent coordinate Bench of equal strength wants to take a different view, it can only refer the matter to a larger Bench, otherwise the prior decision of a co-ordinate Bench is binding on the subsequent Bench of equal strength and if any subsequent judgment by deviating from the earlier judgment of equal number of bench, would be per incuriam. Same was the view of this court in Ardeshir Cowasjee and 10 others Vs. Karachi Building Control Authority (KMC), Karachi and 4 others (1999 SCMR 2883). Thus the judgments passed by the 3-Members Benches, mentioned above, have binding effect upon equal or less Member Benches of this Court, unless contrary is declared by a larger Bench of this Court.

7. It is also a circumstance that the Act 1997 provide sever punishment, therefore, their proof has to be seen strictly and the benefit of any doubt in the prosecution case must be extended to the accused because harder the sentence is, stricter the standard of proof should be. Because for convicting an accused person for such a severe punishment the bounded duty of the prosecution is to prove the case without any breakage of chain, as discussed above.

8. For the forgoing reasons, this petition is converted into an appeal and the same is allowed. The conviction and sentence of petitioner Qaisar, passed by the trial court and upheld by the High Court, is hereby set aside and he is acquitted of the charge in the instant case. He be released from jail forthwith if not required to be detained in any other case.

Crl. S.M.R.P. No. 14 of 2022

9. Petitioner Muhammad Zareef Bhatti alongwith Qaisar was indicted in case FIR No.333 dated 19.08.2011 registered under section 9 (c) of the Control of Narcotic Substances Act, 1997 ('Act, 1997') at police station University Town, Peshawar. After conclusion of trial, learned trial court vide judgment dated 21.06.2012 convicted the petitioner and Qaisar under section 9 (c) of the Act, 1997 and sentenced them to imprisonment for life with a fine of Rs.25,000/- or in default of payment of fine to further undergo six months simple imprisonment. Benefit of section 382-B, Cr.P.C. was also extended to him. Being aggrieved, petitioner and co-convict filed appeals before the Peshawar High Court, Peshawar which were dismissed vide impugned judgment dated 11.11.2014. Thereafter petitioner filed jail petition No. 447 of 2014 before this Court which was dismissed on 23.02.2016 and leave was refused but during the course of hearing of Jail Petition No. 587 of 2015 qua conviction of Qaisar, co-convict of the review petitioner, it was observed that safe custody and safe transmission of the sample parcels have not been established and this fact had been escaped notice from the Bench when Jail petition No. 447 of 2014 filed by the petitioner Muhammad Zareef Bhatti was dismissed on 23.05.2016. The matter was referred to the Hon'ble Chief Justice and it was ordered by the Hon'ble Chief Justice that this Jail Petition No. 447 of 2014 be taken up as Suo Moto Review Petition and be heard alongwith Jail Petition No. 587 of 2015 (already decided above).

10. As in this case neither the safe custody nor the safe transmission was established by the prosecution and we have extended the benefit of such defect in the prosecution case to co-convict Qaisar, so the same benefit is also extended to the petitioner Muhammad Zareef Bhatti, as mentioned above. Consequently, this Suo Moto Review Petition is allowed and the earlier order dated 23.02.2016, passed by this Court, is recalled and the Jail Petition No. 447 of 2014 is restored. For the reasons mentioned in the order in Jail Petition No. 587 of 2016, Jail

Petition No. 447 of 2014 filed by Muhammad Zareef Bhatti is also converted into an appeal and the same is allowed. The conviction and sentence of petitioner Muhammad Zareef Bhatti, passed by the trial court and upheld by the High Court, is also hereby set aside and he is acquitted of the charge in the instant case. He be released from jail forthwith if not required to be detained in any other case.

Islamabad
02.06.2022
M. Saad

APPROVED FOR REPORTING