JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

CRIMINAL APPEAL NO.106 OF 2021

Mohammad Karim
Vs.
The State

Appellant by	**:**	**Mr. Muhammad Ilyas, Advocate.**
Respondent by	**:**	**Mr. Ishtiaq Ahmed, State Counsel.** **Mr. Shah Nazar, Inspector, P.S. Margalla, Islamabad.**
Date of hearing	**:**	**22.02.2022.**

SAMAN RAFAT IMTIAZ, J. This Criminal Appeal has been filed by the Appellant (Mohammad Karim s/o Khayal Mohammad) against the Judgment dated 26.07.2021 ("**Impugned Judgment**") passed by the learned Additional Sessions Judge/Judge Special Court, Islamabad (West), whereby the Appellant has been convicted u/s 9-C of Control of Narcotic Substances Act, 1997 (CNSA, 1997) in the case of FIR No.192/2020 dated 03.10.2020 registered at P.S. Margalla, Islamabad and sentenced to undergo eight (08) years R.I. with fine of Rs.70,000/- (seventy thousands) and in default whereof to further undergo eight (08) months S.I. Benefit of Section 382(B) Cr.P.C., was also extended to the Appellant.

2. Facts of the case, as per the FIR are that on 03.10.2020 the Complainant along with the constables was on patrolling duty when at about 04:05 p.m. spy information was received that a person having huge quantity of narcotics is present at Katcheri Metro Station. Acting on this information the police reached the said place where a person who after noticing presence of police party tried to run away but was apprehended. On inquiry, the person identified himself as Mohammad Kareem resident of Kalanga, Tehsil & District Bara, Khyber Agency

presently residing at Ittefaq Town, Mehrabadi, Islamabad. He was holding a blue colored shopping bag in his right hand, which upon checking was found to contain four packets wrapped in yellow colored solution tape with Heroin that upon weighing turned out to be 1000 grams each and total weighing 4000 grams. Further search revealed 15 grams of Ice from white colored shopping bag in the right side pocket of the Appellant. Out of the recovered narcotics sample of 10 grams of Heroin from each packet and 1 gram from Ice was taken for chemical examination, whereas, the remaining narcotics were taken into possession.

3. The report of chemical examination was positive. Subsequently after submission of challan the charge was framed on 15.01.2021. After trial the Appellant on the basis of evidence was found guilty of carrying 4000 grams of Heroin and 15 grams of Ice and was accordingly convicted under Section 9-C CNSA, 1997 and sentenced as mentioned in paragraph 1 herein above.

4. Learned counsel for the Appellant argued that the Complainant of the case PW-02 Shah Nazar stated that he handed over case property to Moharar of Police Station while Shafique Ur Rehman, Moharar Malkhana who appeared as PW-04 stated in his evidence that on 03.10.2020 one, Tariq Zaman, S.I. handed over to him five sealed parcels. It was therefore argued that case safe custody and safe transmission of samples of the alleged drugs from the spot of recovery till its receipt by the Narcotics Testing Laboratory is not proved which is mandatory in narcotics cases; that it is well settled law that in case where safe custody of the recovered substance or safe transmission of sample of recovered substance was not proved by the prosecution through independent evidence, it could not be concluded that the prosecution has succeeded in establishing its case against the accused beyond reasonable doubt.

5. It was further submitted that parcels of samples were sent to the Chemical Examiner for analysis in violation of Rule 4(2) of the Control of Narcotics Substances (Government Analysts) Rules, 2001 as they were sent after 10 days delay without any plausible explanation.

6. Moreover, that the prosecution without any justified reason failed to produce one of the recovery witnesses, who had taken the complaint to the police station for registration of FIR, which creates an adverse inference against the prosecution and the benefit under Article 129(g) of Qanun-e-Shahadat Order, 1984 must be given in favour of Appellant that if such witness was produced in the Court, he might not have supported the case of the prosecution.

7. According to the learned counsel for the Petitioner, another important point which is not appreciated while deciding the case is that the sealing mark used by the Investigating Officer is neither of the initials/abbreviation of the Investigating officer nor of the name of any person from the raiding party.

8. The learned counsel for the Appellant argued that the prosecution has failed to prove its case against the Appellant and the learned Trial Court instead of giving benefit of doubt to the Appellant has wrongly passed the order of conviction; that the learned Trial Court has misunderstood the evidence on record and as such has wrongly convicted Accused/Appellant without any justification; that there are material contradictions in the statements of PWs and the whole case of prosecution is full of doubts but learned Trial Court while convicting Accused/Appellant has committed patent illegalities, which caused grave miscarriage of justice; and that Impugned Judgment has been passed without application of mind and without taking into consideration the relevant provisions of law, which is against the administration of criminal justice. Learned counsel

for the Appellant relied on *The State Vs. Imam Bakhsh*, 2018 SCMR 2039, *Abdul Ghani Vs. State*, 2019 SCMR 608, *Muhammad Aslam Vs. State*, 2011 SCMR 820, *Hussain Bux alias Kabacho Channa Vs. State*, 2017 PCr.LJ 501, *Minhaj Khan Vs. State*, 2019 SCMR 326, *Mukhtiar Hussain Vs. State*, 2020 YLR 1838, *Akhtar Iqbal Vs. State*, 2015 SCMR 291 and *Aslam Khan Vs. State*, PLJ 2020 Cr.C 1954.

9. Conversely, learned State Counsel supported the Impugned Judgment dated 26.07.2021 and submitted that there are no major contradiction between the PWs; that the prosecution during the trial has proved the commission of offence beyond any doubt; and that the report of the Chemical Examiner is positive. Learned State Counsel prayed for dismissal of the instant criminal appeal.

10. We have heard the learned counsel for Appellant as well as learned State Counsel and have also perused the record.

11. Perusal of the record shows that as per the contents of the FIR as well as of the Recovery Memo of Parcels, 10 grams of Heroin was separated as sample out of each of the four packets of Heroin which altogether weighed 4000 grams and one gram of Ice out of 15 grams of Ice, which were recovered from the Appellant. As such total of ten parcels were created comprising five samples and five principal. Shah Nazar, Inspector who appeared as PW-02 also stated in his Examination-in-Chief that he made ten separate sealed parcels. Despite the foregoing, only four packets of Heroin were exhibited as Ex-P/1 to Ex-P/4 by Shah Nazar, Inspector, PW-02.

12. The Moharar of the Police Station, appearing as PW-04 confirmed having received only five sealed parcels: four of Heroin and one of Ice. Similarly, Tariq

Zaman, S.I. PW-05 also confirmed receipt of five sealed parcels, which he confirmed depositing with NFSA.

13. Furthermore, said PW-02, Shah Nazar, Inspector, stated in his Examination-in-Chief that he handed over the case property to the Moharar of the Police Station and that parcels were sent to NFSA for Chemical Analysis through Tariq Zaman. Neither date was given nor name of the Moharar stated. Conversely, PW-04, Shafique Ur Rehman stated in his Examination-in-Chief that on 03.10.2020 he was posted as Moharar at Police Satiation Margalla and that on same day Tariq Zaman, S.I., handed over to me five sealed parcels containing Heroin and one containing Ice. He further stated that on 13.10.2020 he handed over the five sealed parcels to Tariq Zaman, S.I. for further onward transmission to NIH. On the other hand, Tariq Zaman, S.I. who appeared as PW-05 stated in his Examination-in-Chief that on 13.10.2020 Shah Nazar, S.I. handed over to me five sealed parcels after receiving the same from Moharar along with road certificate for further onward transmission to NFSA and that he deposited the same at NFSA on the same day.

14. It is also noted that PW-02, Shah Nazar, Inspector admitted during his cross-examination that the seal on the parcel was neither in his name nor in the name of any other PW.

15. In view of the above discrepancies, the prosecution has utterly failed to prove its case. Only 40 grams of Heroin was produced into evidence and exhibited, therefore, the prosecution failed to established recovery of 4000 grams of Heroin and 15 grams of Ice as alleged. Prosecution witnesses were not able to advance any explanation as to why the Recovery Officer did not put his own monogram on the seal of the parcels prepared by him. We rely upon *Akhtar Iqbal*

versus The State, 2015 SCMR 291 wherein it was observed that the most important factor which compounded all doubts and raised a big question mark on the veracity of the prosecution's case was that the alleged recovered substances were sealed with a monogram of an inspector who was not even posted at the relevant police station. In the instant case, the monogram on the sealed parcel admittedly did not belong to any of the PWs. In such circumstances it cannot not be concluded that the case property produced before the Trial Court was the same which was recovered from the Appellant.

16. Moreover, safe custody and safe transmission was not proved. The importance of safe custody and save transmission of narcotics cannot be emphasized enough. As held in *Mst. Sakina Ramzan vs State*, 2021 SCMR 451 chain of custody must be safe and secure because the report of the Chemical Examiner is of critical importance under the CNSA, 1997. The chain of custody ensures that the correct representative sample reached the office of Chemical Examiner. Any break or gap in the said chain makes the Report of the Chemical Examiner unreliable for justifying conviction of the accused.

17. The facts of the present case reveal that chain of custody has been compromised on account of the fact that while Shah Nazar testified that he handed over the case property to the Moharar, he did not name the Moharar or provide a date of such delivery whereas PW-04 who appeared as Moharar stated that sealed parcels were received by him from Tariq Zaman, SI. Furthermore, on one hand the Moharar stated that he handed over the parcels for transmission to NFSA to Tariq Zaman, S.I., while the latter stated that it was Shah Nazar, Inspector who received parcels from the Moharar and handed them over to him for transmission to NFSA. Such contradictions make the chain of custody

suspicious, casting doubt on the conclusiveness and reliability of the chemical analysis report. This is compounded by the fact that no reason was submitted for ten days' delay in sending the samples for chemical analysis.

18. In the above circumstances the prosecution has failed to prove recovery as alleged and safe custody and due transmission of even the sample parcel sent to the NFSA and produced into evidence. Therefore, the case against the Appellant has not been proved without reasonable doubt. Consequently, benefit of the doubt is extended to the Appellant and instant appeal is **allowed**. Resultantly, the sentence awarded to the Appellant vide Impugned Judgment dated 26.07.2021 passed by the learned Additional Sessions Judge/Judge Special Court, Islamabad (West), is hereby set aside. The Appellant, who is in jail, is to be released forthwith, if not required in any other case.

(MOHSIN AKHTAR KAYANI)
JUDGE

(SAMAN RAFAT IMTIAZ)
JUDGE

Announced in the Open Court on 29th of March, 2022.

JUDGE **JUDGE**

JUNAID