JUDGEMENT SHEET

ISLAMABAD HIGH COURT
ISLAMABAD

Criminal Appeal No. 123/2015

Ameen Gul.
Versus
The State, etc.

Appellant by: ***Mr. Sajid Mehmood Ch., Advocate.***
Respondent by: ***Mr. Haroon-ur-Rashid, Advocate.***

Date of hearing: ***06.05.2020.***

LUBNA SALEEM PERVEZ; J: This criminal appeal has been filed to assail judgment dated 23.05.2015, passed by the learned Additional Sessions Judge (CNS), East-Islamabad, whereby, the appellant has been convicted for possession of charas/garda and awarded sentence for 20 months rigorous imprisonment with allowable benefits of section 382-B Cr.P.C and fine of Rs. 5000/- and further 10 days simple imprisonment in case of default.

2. Brief facts of the case are that the police party of P.S Sihala, while on a routine patrolling, apprehended the appellant, stated to be approaching from Asghar Hospital side, and allegedly recovered 2 Kgs of charas in a blue shopping bag which he was holding in his right hand. Out of recovered charas 10 grams were separated for chemical examination, and thereafter, both the parcels were sealed and impounded through recovery memo, attested by witnesses from the members of police team. Appellant was arrested under Section 6 read with Section 9-C of CNSA, 1997 for trafficking contraband (charas) and case was registered vide FIR No. 185/2014 dated 18.06.2014. The Appellant was granted bail on 02.10.2014; however, he was again arrested after his conviction and sentence in the

terms mentioned above, vide impugned judgment dated 23.05.2015. Against the impugned judgment, appellant filed appeal before the High Court on 15.06.2015, whereby the sentence of the appellant was suspended, vide order dated 02.07.2015 upon furnishing of bail bond of Rs. 50,000/- and surety in the like amount.

3. Learned Counsel for the Appellant argued that the testimonies of the PWs are at variance; that police has not associated the private witnesses as required u/s 103 of Cr.P.C to prove recovery from the appellant; that under the law the complainant cannot be the investigating Officer as in the present case; that as per FIR 2 Kgs in 2 packets of charas garda was recovered from shopper in possession of the appellant but only one sample of 10 grams from one packet was separated for chemical examination thus same cannot be said to be representative sample and also creates doubt in the prosecution story becomes doubtful; that the appellant has no criminal history and has been involved in a fake case. Learned counsel submitted that due to inconsistencies and illegalities in prosecution case, the conviction and sentence imposed, vide impugned judgment is not maintainable.

4. Conversely, learned State Counsel submitted that CNSA 1997 is a special law and vide section 25 of the Act provisions of section 103 Cr.P.C for associating independent witness is not mandatory; that under the CNSA the complainant of the case can also proceed with the investigation as an investigating Officer; that there is no delay in sending the samples for examination to the lab, report of which was received on 26.06.2014 and that report have not been challenged by the appellant; replying the argument of involving the appellant in a fake case learned State Counsel submitted that the appellant during the trial could not prove enmity against the prosecution, whereas, the prosecution has established its case through evidence of recovery of contraband/charas from the possession of the appellant,

therefore, the impugned judgment dated 23.05.2015 is in accordance with law and the conviction and sentence awarded to the appellant is liable to be maintained.

5. Arguments heard and record perused.

6. Perusal of the record transpired that the appellant has been provided opportunity to rebut the allegations leveled through the evidence produced by the prosecution under the provisions of section 342 of Cr.P.C, and on 22.04.2015, he in response to question No.6 stated to record his statement on oath regarding his innocence, however, as per order sheet dated 24.04.2015, the appellant stated that he neither wants to produce evidence nor make statement on oath as required under section 342 Cr.P.C. It has been held by the Hon'ble Peshawar High Court in the case titled ***"Ijaz Khan vs. The State" (MLD 2016 702)*** that *"Though the appellants have denied the prosecution allegations in their stereotype statements under section 342, Cr.P.C, but mere denial of the charge and pleading innocence without substantiating the same through cogent and convincing evidence in the face of a strong prosecution case cannot earn them acquittal"*. The appellant though pleaded not guilty but did not opt to produce evidence substantiating his innocence and relinquished his right of defence duly provided by the learned Judge Special Court in accordance with law.

7. So far as the argument of the learned counsel for the appellant that the prosecution has violated the provisions of section 103 Cr.P.C by not associating independent witnesses at the time of recovery from the appellant is concerned, reference has been made to Section 25 of the CNSA 1997 which corroborates the submission of learned State Counsel that it specifically excludes Section 103, whereby, there is no legal requirement of associating independent witness in narcotics cases covered under CNSA 1997, which being a special law overrides the

general law i.e. Cr.P.C 1898. Reliance in this regard has been placed on case titled ***"Asif vs. The State" (PLD 2013 Kar 586)***.

8. The statement of the appellant u/s 342 Cr.P.C has also been examined which shows inconsistencies in his statement as while answering question No.1 he stated that he forgot his CNIC at home, however, memo of recovery of personal search/Ex-PB mentioned recovery of National Identity Card/CNIC. Further, the reply to question No.4 of the appellant is self-explanatory as in-spite of negating recovery of the contraband/charas he is defending himself on technical ground i.e. unexplained delay in sending the samples to the lab and receipt of result after 10 months, thus, the appellant has failed to controvert the recovery of contraband from his possession.

9. Further, it has been vehemently argued by learned counsel for the appellant that complainant of the case cannot conduct investigation of its case. Whereas, this point has already been settled by the Hon'ble Supreme Court in the case of ***"Zafar v. The State" (2008 SCMR 1254)*** while holding that law does not prohibit the complainant/police officer who is a witness to commission of crime to be the investigating officer of the case. The relevant extract from the judgment is also reproduced below:-

> *"11. So far as the objection of the learned counsel for the applicant that the Investigation Officer is the complainant and the witness of the occurrence and recovery, the matter has been dealt with by this Court in the case of State through Advocate-General Sindh v. Bashir and others PLD 1997 SC 408, wherein it is observed that a Police Officer is not prohibited under the law to be complainant if he is a witness to the commission of an offence and also to be an Investigating Officer, so long as it does not in any way prejudice the accused person. Though the Investigation Officer and other prosecution witnesses are employees of A.N.F., they had no animosity or rancor against the appellant to plant such a huge quantity of narcotic material upon him. The defence has not produced any such evidence to establish animosity qua the prosecution witnesses. All the prosecution witnesses have deposed in line to support the prosecution case. The witnesses have passed the test of lengthy cross-examination but the defence failed to make any dent in the prosecution story or to extract any material contradiction fatal to the prosecution case. The prosecution has been successful to bring home the guilt of the appellant to the hilt by placing ocular account, recovery of narcotic material, the Chemical Examiner report G.1, Exh.P.3. The learned counsel for appellant has not been able to point out any error of law in the impugned judgment and the same is unexceptionable."*

10. Perusal of the record reveals that the case against the appellant have been registered under section 9-C of CNSA 1997 on 18.06.2014 for recovering 2 kgs of charas/garda from the possession of the appellant contained in blue color shopping bag. The statement and cross examination of the PWs were properly scrutinized and it was found that events of arrest and recovery of charas remained consistent in the statement of PW-1 & PW-3, however, it has been observed from their testimonies that though two packets of charas containing aggregate quantity of 2 kgs were recovered but only 1 sample of 10 grams was retrieved therefrom. The sample was duly transmitted for analysis on 20.06.2014, and in the police record it is also mentioned that one sealed packet of 10 grams of charas was being sent to the laboratory and vide report dated 30.06.2014 (Ex-PF), the sample confirmed to be charas/garda after its chemical examination. In this regard, the judgment of Hon'ble Supreme Court in the case of **"Ameer Zeb vs The State" (PLD 2012 SC 380)** has been referred, whereby, his lordship has held that "*as only one sample of 10 grams has been sent to Chemical Examiner for analysis and the report in that regard has been received in positive, therefore, for safe administration of justice, it would be concluded that accused was liable to be held responsible for having only one cake/slab of charas weighing 250 grams in his possession which offence attracted provisions of section 9-B of the Control of Anti-Narcotics Act, 1997*". Therefore, keeping this observation of the Hon'ble Apex Court in view, we are of the opinion that since one sample of 10 gram has been separated from allegedly recovered 2 packets weighing 2 kgs in aggregate, and sent in the form of one parcel to the chemical examiner, thus the positive report shall be considered only to the extent of one packet and the appellant is responsible for possessing only 1 packet of 1kg charas. After reaching to this conclusion provisions of section 9-C of CNSA 1997 have been perused according to which the punishment for possessing

narcotic drug, psychotropic substance or controlled substance ranging between 100 grams up to 1 kg falls under clause (b) of section 9 of CNSA 1997. Thus, under the circumstances, the appellant has been held responsible for possessing 1kg of contraband, and is liable to be convicted and punished under section 9-B of the CNSA 1997. In this regard, guidance has also been taken from the judgment of Hon'ble Lahore High Court in case of ***Ghulam Murtaza and another vs. The State" (PLD 2009 Lahore 362)***, according to which recovery of charas exceeding 600 grams up to 1000 grams falls under section 9-B of CNSA 1997, and the accused is liable for punishment of rigorous imprisonment of 1 year and 9 months and fine of Rs. 13000/- and in case of default S.I of four months, hence, the sentence awarded to the appellant for 20 months rigorous imprisonment and fine of Rs. 5000/- and further punishment of S.I of 10 days in case of default has been in consonance with the guidelines for punishment laid down in Ghulam Murtaza's case supra.

11. In view of the discussion made, hereinabove, we are of the considered view that prosecution has established the case for recovery of charas from the appellant and, therefore, the judgment dated 23.05.2015, passed by the learned Special Judge is hereby upheld. As a consequence thereof instant appeal is hereby **dismissed** accordingly. Appellant is on bail, he shall be taken into custody and sent to Central Jail Adyala, District Rawalpindi for serving his remaining sentence. His bail bonds stand discharged.

(MOHSIN AKHTAR KAYANI)
JUDGE

(LUBNA SALEEM PERVEZ)
JUDGE