

JUDGMENT SHEET
ISLAMABAD HIGH COURT
ISLAMABAD

Jail Appeal No. 58/2020

SHAKILA BUTT Versus THE STATE, ETC.

Appellant by: ***Mr. Ajmal Khan Khattak, Advocate.***
State by: ***Mr. Muhammad Sohail Khurshid, State Counsel.***
 Muhammad Aslam, Inspector.
Date of hearing: ***16.04.2020.***

LUBNA SALEEM PERVEZ; J: This Criminal Jail Appeal has been filed by the appellant Shakila Butt w/o Afsar Nisar through Superintendent, Central Jail, Rawalpindi, against the judgment dated 19.02.2020, passed by the learned Additional Sessions Judge/Special Judge, Control of Narcotics Substances, West-Islamabad, whereby appellant has been convicted u/s 9-A, 9-C/15 of Control of Narcotic Substances Act, 1997 (CNSA) and sentenced to undergo one year R.I with a fine of Rs. 20,000/- and in default whereof to further undergo two months S.I in case FIR No.127, dated 13.10.2019, registered at P.S Shams Colony, Islamabad. Benefit of section 382(B) Cr.PC has also been extended to the Appellant.

2. Facts in brief are that on spy information search warrant for raiding Naina Beauty Parlor situated in Street No. 24, main street Shams Colony, Islamabad, was obtained by SHO P.S. Shams Colony, Islamabad, as according to the information, appellant Shakila Butt is doing business of drug trafficking under the garb of beauty parlor. The police party entered the house adjacent to the beauty parlor through gate as one part of it was opened and behind the close part a lady namely Shakila Butt / appellant, was sitting on a chair and on her search a white shopper was found from the chair therein contained 1630 gram of charas in the form of littar, one silver electronic scale, mobile phone tape and Rs. 49,700/- (49 notes of Rs. 1000/- and 07 notes of Rs. 100/-). In the meantime, another lady namely Komal Bibi entered the room from whom 20 grams of ice was also recovered. Hence, the FIR was registered against Shakila Butt, Komal Bibi and the owner of

the house namely Afsar Nisar *alias* Arslan *alias* Kala Butt. The samples were taken from the recovered contraband and sent to laboratory for chemical examination on 15.10.2019. The final/supplementary challan in the present case was submitted on 29.11.2019, and charge was framed on 21.12.2019, against all the said three accused persons. The trial was conducted and in conclusion whereof the charges against Shakila Butt and Komal Bibi were found to be proved, whereas, prosecution failed to prove their case against Afsar Nisar *alias* Arslan *alias* Kala Butt as such he was acquitted. Komal Bibi was sentenced to Rs. 10,000/- fine as minor quantity of contraband was recovered from her possession and that she had no previous criminal history. Shakila Butt was sentenced to one year rigorous imprisonment and Rs. 20,000/- fine and in case of default to further undergo two months simple imprisonment, however, the appellant was allowed benefit of 382-B Cr.PC.

3. Learned counsel appearing on behalf of the appellant contended that there are glaring contradictions and infirmities in the evidence produced by the prosecution; that the lady constable namely Sanam Ishaque, who claimed to have carried out personal search of the the convict and recovered the alleged contraband at the time of raid was given up; that the appellant has been falsely implicated in the case; that the case against the appellant and his family was the outcome of personal grudge due to quarrel with Inspector, Mehar Muhammad Aslam and Afsar Nisar, the husband of the appellant; that the judgment of the Trial Court is based on misreading and non-reading of evidence; that appellant has a suckling baby with her in Jail; that she has no previous criminal history and has already undergone six months of imprisonment.

4. Learned State Counsel along with I.O. strongly refuted the arguments made on behalf of the appellant and submitted that she was caught red handed with the contraband; that the appellant was operating drug trafficking business under the garb of beauty parlor; that the premises was raided after obtaining search warrant from the Assistant Commissioner Pothohar, Islamabad; that the contrabands in the white shopper were recovered from her possession from the chair on which she was sitting; that lady constable Sanam Ishaque was given up being unnecessary witness as she did not personally search the appellant; that there is no misreading and non-reading of evidence by the learned Trial Judge and the appeal is liable to be dismissed.

5. Arguments heard and record perused.

6. The Appellant in the present case has been convicted to serve one year imprisonment and fine of Rs. 20,000/- and in default whereof to further undergo two months simple imprisonment for possessing 1630 gram of charas for the purposes of sale. In order to decide the present appeal the FIR bearing No. 127/2019, dated 13.10.2019 and the impugned judgment 19.02.2020, were carefully examined and it is noted that action as per FIR, was initiated on the basis of information disclosed during interrogation of an accused namely Zeeshan arrested in FIR No. 126/2019, dated 13.10.2019, in the same Police Station i.e. Shams Colony. It is also noteworthy that Muhammad Asif Tipu, ASI, PW-4 in the present case, is the complainant in FIR No. 126/2019, but as per the facts recorded in the impugned judgment, the action against the appellant was commenced on spy information. Further the search warrant was obtained to raid the Naina Beauty Parlor situated in Street No. 24, Shams Colony, Islamabad, from AC Pothohar, Islamabad, by the SHO Police Station Shams Colony, Islamabad, on the ground that appellant is actually operating drug trafficking activities from Beauty Parlor. It is noted that application/search warrant dated 13.10.2019, though is the part of the record, however, has not been exhibited as evidence by the prosecution. Contents of the said search warrant shows that the same was obtained for raiding Niana Beauty Parlor, quoting, reliable source of information of drug trafficking by appellant. However, the house the house of appellant was raided without search warrant. From perusal of the record it is noted that accused Zeeshan was arrested and FIR No. 126/2019 dated 13.10.2019, was registered at about 04:00 pm by Muhammad Asif Tipu, ASI (PW-4) and the search warrant was obtained from AC at 4:30 p.m as stated in cross-examination of PW-5, thereafter, the house of appellant was raided at about 06:00 pm.

7. We have also gone through sections 20, 21 & 22 of the CNSA, 1997 which provide for power to issue search warrants, seizure and arrest without warrant and the judgment of Hon'ble Apex Court in case reported as "*Fida Jan vs. The State*" (2001 SCMR 36), whereby, these provisions have been held to be directory and not mandatory, however, the Hon'ble Apex Court in another judgment tiled as "*The State vs. Hemjoo*" (2003 SCMR 881) has observed that "*Combined study of Ss. 20 & 21 of the Control of Narcotic Substances Act, 1997, would show that only in*

exceptional cases in which the search warrant cannot possibly be obtained before conducting the raid, an Officer authorized in this behalf can proceed for conduct of raid without the warrant, but this power cannot be allowed to be used in every case in the normal circumstances". The prosecution story thus appears to be unreliable as there seems no reason to get search warrant despite paucity of time to raid Beauty Parlor when they intend to raid appellant's house, where there were only ladies, without any search warrant. This act of the Police raiding party is without lawful justification and in utter violation of right of privacy of citizens in view of the above referred judgment of the Hon'ble Supreme Court of Pakistan.

8. Record further revealed that lady constable Sanum Ishaq who has conducted the personal search of the female appellant was given up as witness despite the fact that said lady constable claimed to have recovered the white shopper from the possession of appellant wherein the narcotics, silver colored weighing scale, mobile phone tape and cash were found. Argument of learned counsel for appellant in this regard appears to be convincing that the lady constable is one of the main witnesses, who recovered the contraband from the appellant and has also signed the memo of recovery as witness, therefore, giving up her from list of witnesses also creates doubt of involving appellant falsely. It is observed that the silver colored electronic weighing scale and cash were produced as exhibits i.e. Ex:P-2, Ex: P3/1-49 & Ex: P4/1-7, during evidence in trial but the other important objects/recoveries i.e. white shopper and mobile phone tape, have not been exhibited during the trial. The white shopping bag was an incriminating material as not only the alleged 1630 grams Charas but also a weighing scale was also placed in it. In a recent judgment passed by this Court in case of "**Mst. Mariam alias Maria alias Shakeeba vs. The State**" (2019 YLR 2082) it has been observed that non production of incriminating material before the Court results into acquittal on the basis of benefit of doubt extended to the appellant. The relevant portion of the said judgment is reproduced here in below:-

"It is trite law that prosecution is bound to produce the case property allegedly being used in a criminal activity. Reliance is placed upon 2012 SCMR 577 (Amjad Ali v. The State), 2017 PCr.LJ 14 (Abrar Hussain v. The State), 2009 PCrLJ 1334 (Agha Qais v. The State), and 1997 PCr.LJ 1093 (Mst. Nargis v. The State), therefore, by non-production of such incriminating piece of evidence, a serious doubt emerges on record, benefit of which should be extended to the accused not as a matter of grace but as a matter of right."

9. Thus, omission to produce important incriminating material the white shopping bag allegedly containing Charas recovered from the possession of the appellant is another suspicious act on the part of the prosecution for which benefit of doubt goes in favour of the appellant, in view of the above judgment.

10. In addition to the above, the evidence and testimonies of PWs were also perused carefully which revealed the following contradictions in their statements:-

PW-1 constable Sajid Nazir:

- *We straight away went to the house of accused/place of occurrence.*
- *House of the accused was double storey/the color of house was white and the color of main gate was black.*

PW-4 ASI, Muhammad Asif Tipu:

- *Shakila Butt was sitting on a chair, she was over powered by a lady constable and on her personal search a white color shopper was recovered in which churs (color brown), weighing 1630 gram (Ex-P1) in shape of littar was recovered.*
- *Informer informed the I.O qua the occurrence, I do not know when I.O received spy information.*
- *The inter-se distance between P.S and place of occurrence is 1.5 km.*
- *We did not go straight away to place of occurrence.*
- *House of accused was single storey and color was red and white.*
- *After seen a police party accused shakila butt tried to skip away.*
- *Alleged churas was not recovered from personal possession of accused Shakila Butt.*
- *During such proceedings all police officials were present at the gate and nobody including lady constable entered the house/rooms.*

PW-5, Mehr Muhammad Aslam, Inspector:

- *After receiving search warrant from A.C Pothohar Islamabad at 06:00 PM with raiding party raided the house of Afsar Nisar Arslan alias Kala Butt.*
- *She was surrounded by lady constable and on her personal search a shopper bearing colored white as recovered in which churs (color brown), weighing 1630 gram (Ex-P1) in shape of littar was recovered.*
- *SHO took warrant on 13.10.2019 and handed over to me the same at 04:30 pm.*
- *We left police station at 05:30 pm.*
- *The distance between the P.S and alleged place of occurrence is 0.5km.*
- *The house of accused was a single storey.*
- *Alleged recovery of charas was not effected from personal possession of Shakila Butt.*
- *We searched whole house from the inside.*
- *Cash Rs. 49,700/- was recovered from the house of the accused.*

- Both the accused did not try to skip after seeing the police party.
- Sajid Nazir constable took complaint at 06:55 pm and came back at 07:10 pm.
- We left the place of occurrence at 07:00 pm.

11. The above cited inconsistencies in evidence and testimonies are sufficient to create serious doubts about the prosecution story and it is settled law that accused is not required to establish a series of dents and doubts in prosecution case but for giving the benefit of doubt if a single doubt is created even then accused is entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right. Reliance in this regard can safely be placed on the case law reported as ***Muhammad Shahbaz Ali Khalid vs State (2019 SCMR 2012)***, ***Safdar Mehmood vs Tanvir Hussain (2019 SCMR 1978)*** & ***Rajmeer Khan vs Noor-Ul-Haq (2019 SCMR 1949)***. It is observed from the record that prosecution failed to establish its case before the learned Trial Court, who also did not consider the above material contradictions in the statements of the witnesses during trial, thus, the present case is one which is based on misreading and non-reading of evidence, therefore, the sentence awarded on the basis of the above inconsistencies is not sustainable in the eye of law.

12. At this point it is necessary to reproduce the passage from the judgment of this Court reported as ***2019 YLR 2082 Mst. Mariam supra*** for similar action in the present case:-

“Before parting with this judgment, we have observed that the Investigation Officer, although, has taken the black color bag and a chaddar in his possession, but both these incriminating articles have neither been produced in the Court nor the same have been exhibited, which also resulted into acquittal of the appellant and such lapse on the part of prosecution should be rectified, therefore, we hereby direct the Inspector General of Police and SSP (Investigation) to direct all the Investigation Officers to ensure submission of all incriminating articles in the Trial Court at the time of evidence as the Investigation Officers are responsible for exhibition of those incriminating articles in the Trial Court and similarly, the Prosecutors are also bound to ensure the production of those incriminating articles which are necessary to be exhibited. We also expect a sacred duty from the learned Trial Courts to call such incriminating articles from the police and after notifying the same in the judicial proceedings, exhibit those articles while recording the evidence, including the remaining contraband which was sealed separately at the time of recovery proceedings.”

13. Keeping in view the above discussion and placing reliance on the judgments cited *supra*, it is held that the judgment of the learned Trial Court dated 19.02.2020

is not legally sustainable, hence, same is hereby set-aside. The present appeal is **allowed**. The appellant is **acquitted**, who is in jail, shall be released, forthwith if not required in any other case.

(MOHSIN AKHTAR KAYANI)
JUDGE

(LUBNA SALEEM PERVEZ)
JUDGE

Announced in the Open Court on : 23rd April 2020.

JUDGE

JUDGE

Shakeel