

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

Criminal Appeal No. 89/2020

Rashid Ali

Versus

The State

Appellant by: Mr. Amir Abbas Malik, Advocate,
Respondent: Mr. Muhammad Sohail Khurshid, learned
State counsel with Muhammad Iqbal, S.I.,
CIA.
Date of Hearing: 11.08.2020.

FIAZ AHMAD ANJUM JANDRAN, J.- The instant criminal appeal under Section 48 of the Control of Narcotics Substances Act, 1997 ("Act of 1997"), is directed against the judgment dated 12.03.2020, passed by the learned Additional Sessions Judge/Special Judge (CNS), Islamabad-East, whereby appellant was convicted under Section 9(C) of the Act of 1997, and sentenced to undergo two(2) years R.I. with fine of Rs.25,000/-, in default to pay the amount of fine, to further undergo SI for 3 (three) months, in case FIR No.524, dated 21.12.2018, under Section 9/C of the Act of 1997, Police Station Ramna, Islamabad. The benefit of Section 382-B of Cr.P.C was also extended to the appellant.

2. Briefly, the accusation against the appellant in the complaint Ex.PA, on the basis of which FIR No.524, Ex.PB was registered is that on 21.12.2014 complainant (PW-2) alongwith other CIA officials, was present near Meraj Plaza Sector G-11/1, Islamabad when he received spy information that a person is selling narcotic at Suzuki Stopp G-11/1, Islamabad. On this information, at about 5:00 p.m, they reached at the stated place. One person, holding a blue colour shopper Ex.P-1, on seeing the officials tried to escape but was apprehended, who disclosed his name as Rashid Ali (appellant). On search of said shopper, 1045 grams charas (Ex.P-4) and 10 grams ICE (Ex.P-5) were recovered. After investigation, challan was filed in the Court of learned Special Judge (C.N.S.), Islamabad-East where the

appellant was formally charge sheeted to which he pleaded not guilty and claimed to be tried.

3. At the trial, prosecution examined Ali Akbar ASI as PW-1, who registered FIR Ex.PB on receipt of complaint Ex.PA. Muhammad Iqbal Gujjar SI was examined as PW-2. He is the complainant as well as the Investigating Officer of the case, who arrested the accused/appellant, recovered charas weighing 1045 grams (Ex.P-4) and 10 grams ICE (Ex.P-5). 10 grams charas and one gram ICE were separated for samples and remaining narcotics were taken into possession through recovery memo Ex.PC, then he drafted complaint Ex.PA and sent the same to the Police Station for registration for FIR through Ghulam Mustafa constable. On personal search of accused/appellant, two mobile phones Ex.,P-6 & Ex.P-7, original CNIC Ex.P-8, Purse Ex.P-9 and Cash Rs.200/- Ex.P-10 were recovered and taken into possession vide memo Ex.P-D. The Investigating Officer then Inspected the spot, prepared un-scaled site plan Ex.P-E, formally arrested the appellant and sent him to judicial lockup. On Return at the Police Station, handed over the parcels to Moharrir Malkahana, who got deposited the sample parcels in National Institute of Health (NIH) Laboratory and recorded the statements of the PWs under Section 161 Cr.P.C. PW-3 Arif Hussain 2693/HC is marginal witness of recovery memo Ex.P-C and personal belonging taken into possession vide memo Ex.P-D. Muhammad Sarfraz, ASI/Moharrir Malkhana was examined as PW-4, on 21.12.2018 received four sealed parcels from the I.O. and on 31.12.2018 handed over the two sealed sample parcels to Muhammad Umer 8077/C for onward transmission in the NIH laboratory. Muhammad Umer 8077/C was examined as PW-5. He deposited the samples parcels in NIH Laboratory. It is important to mention that the prosecution has given up one of the recovery witnesses namely Ghulam Mustafa 4507/C, being unnecessary and after tendering NIH report Ex.P-F closed the prosecution evidence on 27.02.2020.

4. After the recording of above prosecution evidence, appellant was examined under Section 342 of the Code of Criminal Procedure 1898 ("Cr.P.C"), wherein he denied the allegations and opted not to make his statement on oath or produce any witness in his defence. The learned Trial Court, after hearing learned counsel for the accused and learned Prosecutor, convicted and sentenced the appellant as mentioned in para-1 *supra* vide judgment dated 10.03.2020, being assailed through the instant criminal appeal.

5. Learned counsel for the appellant argued that the prosecution evidence is not worthy of credence; that there are material contradictions in the statements of prosecution witnesses; that the recovery is planted; that one of the recovery witnesses namely Ghulam Mustafa 4507/C had been given up unnecessarily, therefore, the impugned conviction and sentence is liable to be set aside.

6. On the other hand, learned State Counsel stood behind the judgment and argued that the appellant was arrested red-handed at the spot and 1045 grams chars and 10 grams ICE were recovered from his possession; that both the recovery witnesses successfully stood the test of cross-examination; that the defence remained unable to create any dent in the prosecution evidence, therefore, appeal is liable to be dismissed.

7. We have heard the learned Counsel for the appellant, learned State Counsel and have gone through the record.

8. The record appended alongwith the instant appeal when examined with due consideration, it reveals that the instant case was registered by the CIA Staff vide complaint Ex.PA and thereafter FIR Ex.PB was recorded by PW-1 of the same CIA Staff. Ultimately, challan was submitted before the Court of competent jurisdiction, also by the CIA authorities, not only this, but the prosecution witnesses

were also of the CIA Staff posted in the CIA Police Station at the relevant time.

9. By now, it is settled that when law requires a thing should be done in a particular manner, it should be done in that manner alone and not in any other way. Section 156 (1) of the Cr.P.C, specifically stipulates that the case registered under CNSA, 1997 is required to be investigated, proceed with by the concerned Police Station and the CIA Staff figures nowhere. Non-compliance of the statutory provision would amount to an illegality. The forum which was not competent to conduct the investigation, when investigated, the same would be considered as without jurisdiction. In the case of “State through Advocate General Sindh V. Bashir and others” PLD 1997 Supreme Court 408, it is held that :-

“Under subsection (1) of Section 156, Cr.P.C., the power to investigate a cognizable offence under the above provision has been conferred on any officer Incharge of the Police Station having jurisdiction over the local area within the limits of such Police Station .

Only an officer incharge of the police station having jurisdiction over the local area within the limits of a police station can investigate a cognizable offence or any other person covered by the definition of the officer incharge of a police station given in the clause (p) of Section 4, Cr.P.C. which, in the absence of officer incharge of a police station, “includes officer incharge present at the station house who is next to the officer incharge of the police station and is above the rank of the constable or when the Provincial Government so directs, any other police officer so present.

The above does not include C.I.A. personnel, therefore, they have no power to investigate a cognizable offence.

10. The above principle was followed by the Hon’ble Sindh High Court in “Dodo V. The state” (2009 YLR 2049 Karachi) wherein principle has been laid down in following terms:-

“18. All officials had to act according to law and not otherwise. It would, however, appear that every word used by the legislature must be given its true meaning and all provisions be construed together in a harmonious manner. To our mind, it would not be legal and proper to apply one provision of law in isolation to the other as no redundancy can be attributed to the legislature organ of the State.

19. The learned counsel for the appellant rightly referred to the case of State v. Bashir (Supra), in which the Honourable Supreme Court specifically directed the CIA officials not to conduct investigation by detaining the people themselves unless the F.I.R. is registered at the police station having jurisdiction and investigation being conducted by the police officials, per order of the competent authority, is transferred to CIA official.

20. In the present case the arrest and investigation conducted by the complainant was a clear flouting of the order of the Honourable Supreme Court, hence cannot be declared legal. The CIA officials have also violated the provisions of section 166 (1) & (4) of Cr.P.C. and Chapter XXI Rules 25.3 and 25.4 of Police Rules, 1934 as prior to arrest of the applicant he should have informed the area police station and if arrested should have 'been produced the appellant before the concerned S.H.O.

21. In our view the CIA had no authority to detain the appellant for 5 hours without registration of the F.I.R. They should have produced him and the contraband before the area police and this was the duty of the concerned S.H.O. to deliver the investigation to any of his subordinates and thereafter, the CIA official could have taken the investigation after the order of the competent authority, which was lacking in this case. The investigation conducted by the CIA official was illegal, void and without lawful authority, therefore, the impugned judgment is not sustainable in law. We therefore, set aside the impugned judgment and acquit the appellant.”.

In another judgment, in case of “Muhammad Afzal V. The State” (PLD 2000 Supreme Court 816), it is held that:-

8. The record reveals that through CIA personnel knew it very well that they were not empowered to investigate this matter, yet, they had done so and in this way deliberately violated the provisions of section 156, Cr.P.C. Although they had prior information about the offence which was likely to be committed, yet, they had not passed on this information to the concerned police and took upon themselves the task of investigation which, we feel, was not proper. What they had done was in violation of law and was also against the principle of supremacy of law.

11. From above case laws, it is unambiguously held that CIA officials have no authority and mandate to arrest, seize the articles, separate samples, deposit the same in laboratory, to put the accused in the lockup, to proceed with the investigation, record statements under Section 161 Cr.P.C, submit report under Section 173 Cr.P.C, appear in Court as witnesses in the capacity of being posted at CIA Staff. Instead, they are required to entrust /transmit any information having in their possession to the concerned Police Station for its further proceeding as per law, unless they are expressly, authorize by the concerned police/ competent authority.

12. The Investigation in the case at hand could not be described/ termed as due investigation and it is held that the same was not as per law/police rules. It was asked by the Court to the learned State Counsel that whether any permission was granted to the CIA Officials in the case at hand by the competent Authority i.e. police authorities to investigate the matter, wherein it was replied that there is no such permission to investigate the case by the CIA Officials, therefore, it is held that unless said permission/ authority was granted to the CIA Officials, which is missing in the instant case, then the exercise conducted by them could not be described as investigation as per law. In this respect, the provision of Section CNSA, 1997 particularly Sections 27, 28, and 47 are very relevant and are reproduced hereunder:-

27. Disposal of persons arrested and articles seized

(1) Every person arrested and articles seized under a warrant issued under section 20 shall be forwarded without delay to the authority by whom the warrant was issued; and every person arrested and article seized under section 20 or section 21 shall be forwarded without delay to:-

(a) the officer-in-charge of the nearest police station;
and

(b) the Special Court having jurisdiction.

(2) The authority or officer to whom any person or article is forwarded under this section shall, with all convenient dispatch, take such measures as may be necessary under the law for the disposal of such person or article.

28. Powers to invest officers of law enforcement agencies with powers of an officer-in-charge of a police station

The Federal Government may invest any officer of law enforcement agency or any other officer within their respective jurisdiction with the powers of an officer-in-charge of a police station for the investigation of offence under this Act.

47. Application of the Code of Criminal Procedure, 1898

Except as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1898 (Act V of 1898), hereinafter referred to as the Code (including provisions relating to confirmation of a death sentence) shall apply, to trials and appeals before a Special Court under this Act." (emphasis added)

13. In certain cases, where the concerned SHO/DSP is of the view that certain expertise and skills of the CIA staff is required, then the CIA Staff could be asked to investigate a particular case but the CIA cannot exercise its authority on its own.

14. In the light of above, it is held that the investigation conducted in contravention of Section 156 (1) Cr.P.C by the CIA Staff is without lawful authority and of no legal consequence.

15. According to the prosecution evidence as reveals through the statement of PW-2 SI/IO, after conducting proceedings at the spot on 21.12.2018, he reached the police station and handed over the case property alongwith samples of 10 grams each of the charas and ICE, to the Moharrir Malkhana for its safe custody while

as per statement of PW-4 Moharrir Malkhana, on 31.12.2018, he handed over said two sealed parcels for its onward transmission to the NIH laboratory, which were deposited on the same day i.e. 31.12.2018. It is thus clear that the samples collected were sent to the laboratory with a delay of 10 days of the alleged recovery, in violation of Rules 4 and 5 of the Control of Narcotic Substances (Government Analysts) Rules, 2001, whereby the samples are to be dispatched for analysis within seventy two hours of the recovery.

16. It also gleans out of record that the appellant is aged about 21 years, a first offender with no previous record of any nature and has a life ahead, therefore, there is a chance of his rehabilitation.

17. The another important fact is that the appellant has taken a specific plea in his statement under Section 342 Cr.P.C that he was a taxi driver by profession, the I.O. intended to book him for his personal affairs and on refusal, the instant case was planted against him. This specific defence plea was not rebutted by the prosecution witnesses in their respective statements.

18. In view of above, the conviction and sentence rendered through the impugned judgment are not legally sustainable. Consequently, the instant appeal is allowed. Impugned judgment dated 12.03.2020 is set aside and the appellant is acquitted of the charge. He shall be released forthwith if not wanted in any other case.

(MOHSIN AKHTAR KAYANI) (FIAZ AHMAD ANJUM JANDRAN)
JUDGE JUDGE

A.R. ANSARI

Announced in open Court: 10-09 .2020.

JUDGE

JUDGE