

JUDGEMENT SHEET
ISLAMABAD HIGH COURT
ISLAMABAD

Jail Appeal No. 227/2018

JAVED KHAN. Versus THE STATE, ETC.

Appellant by: ***Raja Amir Shehzad, Advocate.***
(On State's Expense)

State by: ***Mr. Sohail Khurshid, State Counsel.***

Date of hearing: ***26.02.2020.***

LUBNA SALEEM PERVEZ: J: This Criminal Jail Appeal has been filed by the appellant Javed Khan S/o Ajab Khan through Superintendent, Central Jail, Rawalpindi against the judgment dated 20.12.2018, passed by the learned Additional Sessions Judge-X, West-Islamabad, whereby appellant was convicted u/s 9-C&15 of Control of Narcotic Substances Act, 1997 (CNSA) and sentenced to undergo Four Years and Six Months R.I with a fine of Rs.20,000/- and in default whereof to further undergo 06 months S.I in case FIR No.49, dated 11.02.2018, registered at P.S Sabzi Mandi, Islamabad and benefit of section 382(B) Cr.PC was also extended to the Appellant.

2. Facts of the case as per record are that the appellant was apprehended on spy information and 1850 gram charas in littar form wrapped in blue shopping bag was recovered from him. After separating 10 grams for chemical analysis, both the packets were sealed and handed over to the officials. As per prosecution, no private witness was associated as no one agreed to witness the case on the spot, therefore, the officials of the raiding team were associated as the witnesses of the arrest and recovery. The FIR was thus registered against the appellant/convict under sections 9-C &15 of CNSA. Charge was framed against the appellant on 21.03.2018, and after the trial, he was found guilty of committing the offence, hence, convicted and awarded sentence vide judgment dated 20.12.2018.

3. Learned counsel for the Appellant argued that no independent witness was associated by the prosecution despite the fact that the appellant was arrested from the busy commercial area and submitted that associating private witnesses is a

requirement of law. Learned counsel while highlighting the lacunas in the prosecution case argued that as per FIR, 1850 grams charas recovered was in the form of littars but quantity of littars was not mentioned; that the constable namely Fakhar Iqbal, one of the team member of the police party who forwarded the complaint to the police station for registration of FIR, was also not produced as witness; that the commission of the offence as per FIR is dated 11.02.2018, however, the sample separated for chemical examination have been sent to the laboratory on 23.02.2018, i.e. after the delay of about 13 days, which is against the settled principle of law for sending sample within 72 hours. He submitted that the appellant is behind the bars since his arrest on 11.02.2018 and has undergone almost half of sentence awarded to him. Learned counsel lastly submitted that prosecution has failed to fulfill the requirements of law, therefore, the appeal filed by the appellant/convict merits acceptance. During the course of arguments, learned counsel relied on the following judgments in support of his contentions:

- i) *Zarab Khan versus The State* reported as (2019 PCr.LJ 544).
- ii) *Ijaz Ahmed and others versus The State and others* reported as (2018 PCr.LJ 698).
- iii) *Imtiaz Ali versus The State* reported as (2018 YLR 1067).
- iv) *Shan versus The State* reported as (2018 MLD702).

4. On the other hand, learned State Counsel submitted that the appellant/convict was caught red handed with the contraband and submitted that after trial, the appellant was convicted for the above said sentence as per principles laid down vide judgment of Hon'ble Lahore High Court passed in case titled Ghulam Murtaza and another versus The State reported as (PLD 2009 LHR 362).

5. We have heard the learned counsel for appellant as well as learned State Counsel and also perused record with their able assistance.

6. The appellant in the present case has been convicted for an offence committed under sections 9-C&15 of CNSA on the basis of testimony of the police officers. No private witness was associated despite their own statement in the FIR that the appellant was arrested with charas from a busy area. Record reveals that during recording of statements, the PW-3 & PW-4/the I.O and the constable,

respectively, have stated that they were on the private vehicle, however, both of them do not remember the registration number, model and colour of the vehicle and also the person who was driving the said vehicle. There is also a contradiction between the statements of PW-3 & 4 as PW-3 stated that:-

"جب ہم جائے وقوعہ پر پہنچے تو وہاں پر زیادہ رش نہ تھا۔"

However, in the statement of PW-4 it is stated that:-

"جائے وقوعہ پر اس وقت کافی رش تھا۔"

7. The statement of the PWs regarding not associating independent witness despite apprehending the accused from crowded place is the violation of provision of Section 103 Cr.PC as the mandatory provisions of the said section is meant to legally justify the recovery through neutral witnesses and the non compliance of the provision casts serious doubt on the transparency of search and recovery. The Hon'ble Peshawar high Court in the case titled Muhammad Akram versus The State (1995 MLD 1532) has explained the significance of section 103 Cr.PC in the following words:

"There is no denying the fact that recovery in a case like the one in hand is an important piece of evidence which is to be established by independent, disinterested and respectable persons of locality. This is precisely the reason that the express and mandatory provision of section 103, Cr.P.C. cannot be ignored or brushed aside on whim and caprice of the investigating officer except on well-founded grounds and in exceptional cases. On these premises, it is strongly urged that violation of the provision of law under reference or unexplained digression therefrom, exposes the alleged recovery to distrust."

8. In addition to the above, the statements of prosecution witnesses PW-2 & 3 also show glaring contradictions as according to the statement of PW -2:-

"مورخہ 23.02.18 کو I.O کی ہدایت پر نمونہ پارسل بحوالہ روڈ سرٹیفکیٹ نمبر 72/18 جو کہ EX-PB ہے غنفر نیاز 3695/HC بغرض جمع کروانے NIH لیبارٹری چک شہزاد گیا۔ نمونہ پارسل جمع کروانے کے واپس تھانہ آیا۔ موصول شدہ روڈ سرٹیفکیٹ میرے حوالے کیا۔"

However, PW-3 stated that:-

"ڈاکٹ انگریزی کیلئے مورخہ 22-2-18 کو درخواست برائے ڈاکٹ انگریزی ETO صاحب اسلام آباد تحریر کر کے بدست محمد یونس 3647/c کے حوالے کی مورخہ 23-2-18 کو یونس 3647/c نے ڈاکٹ انگریزی جاری کروا کر معہ روڈ سرٹیفکیٹ NIH لیبارٹری بھجوا یا جس نے اسی دن لیبارٹری میں سپریم جمع کروا کر روڈ سرٹیفکیٹ وصولی شدہ کی پشت پر وصولی تحریر درج ہے۔"

9. The above glaring contradictions in the statements of above said prosecution witnesses have been ignored during the trial. The contradictory statements of the PW-2 & PW-3 in respect of forwarding the sample to the laboratory for chemical examination on 23.02.2018 by naming two different persons adversely effects the case of the prosecution.

10. Further, the record shows that the quantity of littars has neither been mentioned in the contents of FIR nor any question was put to the witnesses in this regard. Moreover, there is no plausible explanation regarding delay in sending of samples to the lab for chemical examination. As per rule 4(2) of the Control of Narcotics Substance (Government Analysts) Rules, 2001, the prescribed time for transmission of samples for examination is 72 hours. Therefore, the retaining of the narcotics/contraband with the police for about 13 days creates suspicion on the safe custody and safe transmission of the samples. It has been held by the Hon'ble Supreme Court vide cases reported as **Abdul Ghani Vs. The State (2019 SCMR 608)**, **The State Vs. Imam Bakhsh (2018 SCMR 2039)**, **IkramUllah Vs. The State (2015 SCMR 1002)** and **Amjad Ali Vs. The State (2012 SCMR 577)** that cases where the safe custody of recovered substance or safe transmission of samples of the recovered substance is not proved by the prosecution through independent evidence therefore, it cannot be concluded that prosecution has succeeded in establishing the case against the appellant beyond reasonable doubt. The perusal of cases reported as **Imtiaz Ali Vs. The State (2018 YLR 1067)** and **Shan Vs. The State (2018 MLD 702)**, relied upon by the learned counsel for the appellant in relation to delay in sending samples to chemical examiner, reveals that even five and seven days delay have not been condoned by the Hon'ble High Courts and it has been observed that the benefit of doubt is to be resolved in favour of the accused/convict.

11. In the light of what has been discussed above, we are of the view that the learned Trial Court has not taken into consideration the important aspect of violation of section 103 Cr.PC; the contradictions in statements of the prosecution witnesses and delay in sending the samples for chemical examination during trial. These apparent discrepancies in the investigation and trial coupled with non compliance of the requirement of law in the present case leads towards allowing the

benefit of doubt to the accused and therefore, the present appeal is allowed. Appellant is acquitted of the charge while giving him benefit of doubt and in consequence whereof, his conviction and sentence, vide judgment dated 20.12.2018, is set aside. The appellant, who is in jail, be released forthwith, if not required in any other case.

(MOHSIN AKHTAR KAY/ANI)
JUDGE

(LUBNA SALEEM PERVEZ)
JUDGE

Announced in the Open Court on : 19th March 2020.

JUDGE

JUDGE

JUNAID USMAN