

JUDGMENT SHEET

**IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)**

Cr.A No. 66-M/2016

The State.....(Appellant)

vs

Sanobar.....(Respondent)

Present: Mr. Haq Nawaz, Asst:A.G for the State.

Barrister Asad-ur-Rahman, for the
respondent/accused.

Date of hearing: 07.09.2022


JUDGMENT

Dr. Khurshid Iqbal, J.-

1. This appeal is directed against the judgment dated 15.02.2016 of the learned Additional Sessions Judge/Judge Special Court, Swat, whereby he has acquitted the respondent/accused Sanobar s/o Talizar r/o Wach Khwar, Khwazakhela, Swat. The respondent/accused was tried under section 9 (b) of the Control of Narcotic Substances Act, 1997, having been charged vide FIR No. 203 dated 13.03.2014 registered at Police Station Khurshid Khan Shaheed, District Swat.

2. Necessary but relevant facts of the case are that on 13.03.2014, at 11:00 hours, the police personnel of Police Station Khurshid Khan Shaheed,

got information that the respondent/accused, in his shop situated in Sheen Bazar, was selling and purchasing Chars. The police contingent, led by ASI Umar Rahim, rushed to the spot, where the respondent/accused was found outside of his shop. The respondent/accused was bodily searched, which led to the recovery of a plastic bag having Chars, in his trouser fold. The Chars was weighed. It was found to be 525 grams. The seizing officer (PW-3) separated 05 grams Chars for chemical examination, sealed it in parcel No. 1 and the remaining in parcel No. 2. He prepared a memo of the recovery, drafted the Murasila and arrested the respondent/accused. He forwarded the accused, case property and the Murasila to the Police Station through Constable Abdul Wahid No. 2753, for registration and investigation of the case.



3. CIO, Muhammad Ayaz, conducted investigation of the case. During investigation, the Investigating Officer took into possession a mobile phone of the respondent/accused vide recovery memo Ex PW 7/2. He prepared a memo Ex PW 7/5 of pointation by the respondent/accused, recorded statements of the witnesses and also took photographs, Ex PW 7/6. He produced the respondent/accused for recording his confessional statement. On refusal, the

respondent/accused was sent to judicial lock-up. He received the FSL report, Ex PW 7/8 and placed the same on the case file.

4. On completion of the investigation, final report (challan) was submitted before the learned trial Court. Copies were supplied to the respondent/ accused in compliance with Section 265 (c) Cr. PC. Charge was framed against him, to which he pleaded not guilty and claimed trial.

5. The prosecution examined as many as 09 PWs. Thereafter, statement of the respondent/accused u/s 342 Cr. PC was also recorded, in which he was afforded an opportunity of evidence in defence and/or statement on oath but he did not avail it.

6. After hearing arguments of the learned P.P and counsel for the respondent/accused, the learned trial Judge acquitted the respondent/accused through his impugned judgment dated 15.02.2016.

7. Key grounds of appeal are that the respondent/accused was directly charged in the FIR, the case was promptly registered, the contraband Chars was recovered from his personal possession and the FSL report was returned as positive.

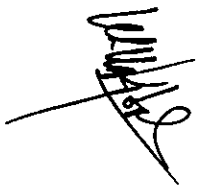


8. The learned A.A.G argued that the learned trial Judge has not properly appreciated the above-referred significant aspects of the case, which as per his contention, the prosecution has proved.

9. Learned counsel for the respondent/accused, on the other hand, argued that there are material contradictions in the evidence of the prosecution regarding the allegations of selling and purchasing of the contraband Chars, the recovery and safe custody as well as safe transmission of the case property to the FSL, which has rightly resulted into acquittal of the respondent/accused.

10. We have heard arguments of Mr. Haq Nawaz Asst:A.G, for the State as well as Barrister Asad-ur-Rahman, learned counsel for the respondent/accused and perused the material available on record.

11. Constable Sardaraz Khan No. 266 (PW-2), a marginal witness of the recovery memo, negated the recovery on the spot as he deposed that the contraband Chars was weighed by the complainant/seizing officer in the vehicle. Needless to say, the contraband Chars was to be weighed on the spot. The next material doubt reflected in the statement of PW-2 is that the contraband Chars was found in the shape of



packets (پھوڑیاں), whereas in the recovery memo (Ex PW 2/1) and, as per the deposition of the complainant/seizing officer, the same was not shown to be in packets (پھوڑیاں). When asked about the separation of samples from the so-called pieces, he expressed his lack of knowledge. Yet another anomaly apparent from his deposition is that he failed to disclose as to whether and which seal was affixed by the complainant/seizing officer on the parcels of the case property. The other marginal witness of the recovery memo was Constable Abdul Wahid No. 2753, who was examined as PW-9. His cross-examination reveals that the contraband Chars was in the form of a slab and that only sample was separated from it. His cross-examination further reveals that no seal was put on the parcel. It further divulges that the respondent/accused on seeing the police party, entered the shop of a barber, from where he was arrested.

Wahid

12. The complainant/seizing officer was examined as PW-3. While under cross-examination, he admitted that:

- i. He conducted no test purchase in respect of the allegations regarding selling and purchasing of the contraband Chars.
- ii. The respondent/accused saw the police party but he did not try to run away from the spot.

- iii. He did not count the number of pieces of Chars while he was weighing it. This indicates that even he himself blew off his contention that the contraband Chars was in one single block.
- iv. He separated samples from only one piece.
- v. He has no monogram of his name and that he had used the monogram of SHO Ghani Rahman, the initial of which is G.R.

13. PW-4 is the statement of ASI Abdul Wali Khan, who received the Murasila from Constable Abdul Wahid No. 2753, which he incorporated into FIR. PW-5 is the testimony of Constable Said Rahman No. 2111, Muharir in the Police Post Fateh Pur. He deposed in his examination-in-chief only this much that he handed over the samples of 05 grams Chars to Constable Yaseen No. 631 (PW-6) on 13.03.2014, for transmitting it to the FSL.

14. From the deposition of these two PWs, it is not clear that Constable Abdul Wahid handed over the case property comprising of parcels, both of the samples and the remaining, to the Muharir in the Police Station. It is also not stated at all as to whom the case property was handed over in the Police Station. It appears that the case property would have been given to Constable Said Rahman No. 2111 (PW-5) Muharir of the Police Station, but he did not state it at all. PW-5



was supposed to have kept the case property in safe custody, entered it in register No. 19 and then handed it over to the Investigating Officer, who was further supposed to have handed it over to Constable Said Rahman and Yaseen Ullah for transmitting it to the FSL. Constable Said Rahman has even deposed that he handed over the samples to Constable Yaseen Ullah on 13.03.2014. When Yaseen Ullah entered the witness box as PW-6, he deposed that he took the samples to the FSL on 14.03.2014, the next day.

15. Muhammad Ayaz, the Investigating Officer, was examined as PW-7. A critical reading of his deposition would show that he recovered the cell phone of the respondent/accused vide a memo, obtained his police custody for investigation and took the respondent/ accused to the place of occurrence for pointation. In his examination-in-chief, he has kept mum on material aspects of the case, such as whether and when he received the case property, whether and how he managed the safe custody of the contraband Chars in the Police Station and its safe transmission to the FSL. While under cross-examination, he admitted that the place of occurrence (Sheen Bazar) is a busy place, where private persons could have been examined in support of the occurrence. He was asked a



specific question in this regard, to which he replied that he did his best but no one was ready to come forward. In reply to another question, he stated that though he had the power to initiate legal action against any member of the public, who refused to be a witness of the proceedings but he initiated no such legal action.

16. Under section 25 of the CNSA, 1997, compliance of section 103 Cr.P.C is not mandatory. While there are rulings of the hon'ble superior Courts both for and against the application of section 103 Cr.P.C, the thrust of the judicial opinion is that regardless of the requirements of section 103 Cr.P.C, the police officials shall, where the recovery has been effected in a public place, associate private persons with the recovery proceedings. The hon'ble superior Courts held that this is necessary in order to lend credibility and ensure transparency in the legal processes. It has also been held that association of private witness to the recovery will also ensure what is known as the rule of caution. Certain cases may be referred here. In Hakim Ali v. The State (2001 P Cr.L.J 1865) [Karachi], conviction and sentence was set aside for the reason that no independent witness was examined in the case despite the fact that the occurrence took place during the day time. In a

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2013 case, while acquitting the accused, the hon'ble Court, among others, observed that non association of private witnesses to the recovery proceedings, despite the fact that a large number of people were present at the crime scene, the prosecution story appeared to be unnatural, Ghulam Mustafa alias Mushtaq Ali v. The State (2013 P Cr. L.J 860) [Sindh]. A similar opinion was expressed by this Court in a case titled as Imran v. The State reported as 2013 P Cr. LJ 640. Regarding the non production of the copies of daily diary, it was held in *Ghulam Mustafa's supra* and Wahab Ali and another v. The State (210 P Cr. LJ 157) [Federal Shariat Court], that such a defect would create a material doubt, the benefit of which must go to the accused. It is in such circumstances of the case in hand, mere positive result regarding chars, furnished by the FSL, is not sufficient to be taken as ground for conviction. It is quite clear that the best available evidence was excluded by the prosecution. The established principle is that the prosecution is bound to prove his case beyond any reasonable shadow of doubt.

17. Constable Hazrat Ali No. 674, was produced as PW-8, who furnished evidence of the fact that the respondent/accused made pointation of the

Wahab Ali

place of occurrence to the CIO, regarding which a memo was also prepared in his presence.

18. The conclusion of the above discussion is that substantial dents are floating in the evidence of the prosecution. To sum up, the exact shape of the contraband Chars was not proved. The PWs materially differed on whether the contraband Chars was in one block/slab or in different pieces. They also remained inconsistent regarding the separation of samples from one block/slab and/or different pieces. The safe shifting of the contraband Chars, its receipt and safe custody in the Police Station is materially doubtful. The prosecution case is deficient inasmuch as the case property was not entered in register No. 19. It is abundantly clear that one of the PWs, namely Yaseen Ullah, received the samples on 13.03.2014, but he took it to the FSL on 14.03.2014, with no explanation at all. Though, the complainant/seizing officer stated that while leaving the Police Station for the place of the occurrence, entry was made in the daily diary, but the Investigating Officer did not place it on the record. Yet another substantial doubt in the prosecution case is that the complainant/seizing officer did not put the monogram of his name on the parcels rather, the worst is that he put the monogram of another police officer,

Yaseen Ullah

who was not present with the police party at the time of recovery. For the sake of guidance, reference may be made to the case law on the subject. In the case of

Akhtar Iqbal vs. The State reported as **2015 SCMR**

291, the Hon'ble Apex Court has held that:

"The learned counsel for the appellant has taken us through the statement made by the sole surviving attesting witness of the Memorandum of Recovery namely Mati-ur-Rehman (P.W.2) and has pointed out a number of factors available in his statement which had created some doubts in the alleged recovery effected from the appellant but the most important factor in that connection, which compounded all those doubts and raised a big question mark upon the veracity of the prosecution's case against the appellant, was that after allegedly recovering the contraband substance from the boot of the motorcar driven by the appellant the parcels of the recovered substance were sealed with a monogram reading as SJ and it had been disclosed by Mati-ur-Rehman (P.W.2) before the learned trial Court that the said monogram belonged to one Sameen Jan Inspector who was not even posted at the relevant Police Station at the time of the alleged recovery from the appellant and as a matter of fact at the said time the said Inspector was serving at a Police Station in Quetta. Mati-ur-Rehman (P.W.2) had not been able to advance any explanation whatsoever as to why the recovery officer namely Assistant Director Rehmat had not put his own monogram on the seals of the parcels prepared by him and as to why he had used the monogram of some other officer who was not even posted at the relevant Police Station at the relevant time. As if this were not enough, a question had arisen before the learned trial Court as to whether samples had indeed been secured from each and every separate packet of the narcotic substances allegedly recovered in this case or not and in that regard the learned trial court had ordered descaling of two parcels of the recovered substances and the note recorded by the learned trial Court in that regard tends to create an impression as if the claim of the

prosecution that a sample had been taken from each and every slab of the recovered substances might not be correct."

Similarly, this Court in the case of Usman Shah vs. The State reported as 2022 YLR 821, observed as under:

"The seizing officer while appearing before the Court as PW-2, deposed in his Court's statement that after recovery of contraband, he separated samples for FSL purpose and sealed in parcels Nos.1 to 8 and remaining stuff in parcel No.9 with a monogram of "MK" which, he categorically admitted that same is not pertained to his name and in fact the same stands for Mukhtiar Khan, S.I., who was stated to be present with the complainant. The alleged recovery seems to be doubtful, rather hints at something to be planted by complainant, because said Mukhtiar Khan SI was never cited as a witness during proceedings in the instant case."

Yet, in another case titled Ayaz alias Imran vs. The State reported as 2021 YLR 1613, it was held:

"Regarding monogram, he stated that; "My personal monogram has an inscription of MK. It is correct that my name is Iftikhar Ahmad. It is incorrect to suggest that MK is not my monogram." On the other hand, PW.3 Madad Khan, Inspector/CIO who conducted investigation in the instant case categorically admitted that MK monogram is the abbreviation of his name, which is lying in the PP. He further admitted that; "The MK monogram lying in the PS normally and whenever requires by any office the same requisition from the PS; however, at the relevant time it was present in the PP." He further stated that; "MK monogram available in case of need in the PS and PP and also after need remain in my custody." No doubt, the said monogram

Mukhtiar

does not signify the name of the seizing officer PW-1 namely Iftikhar Ahmad ASI and; no explanation was offered as to why the said parcels did not contain the monogram of seizing officer, as such, has created a serious doubt regarding the seizer of contraband.”

19. An accused person, as a matter of right, is presumed to be innocent before trial unless the charge is proved against him/her. Acquittal at the trial gives rise to double presumption of innocence for an accused. An appellate Court needs to be cautious while considering the evidence and should avoid reversal of an acquittal, unless it finds that the acquittal is perverse, conjectural, arbitrary, jurisdictionally defective and prompted by mis-reading or non-reading of evidence. Even if a contrary view is formed on re-appraisal of evidence, it should not be used to disturb an acquittal, provided convincing evidence is available on the record to reverse acquittal. In this respect, reference may be made to the judgment of the Hon'ble Apex Court rendered in the case of Jehangir vs. Aminullah & others reported as 2010 SCMR 491, where it was held:

“It is well-settled by now that there are certain limitations on the power of the Appellate Court to convert acquittal into a conviction. It is well-settled that Appellate Court would not interfere with acquittal merely because on reappraisal of the evidence it comes to the conclusion different from that of the Court acquitting

the accused, provided both the conclusions are reasonably possible. If, however, the conclusion reached by that Court was such that no reasonable person would conceivably reach the same and was impossible then this Court would interfere in exceptional cases on overwhelming proof resulting in conclusive and irresistible conclusion; and that too with a view only to avoid grave miscarriage of justice and for no other purpose. The important test visualized in these cases, in this behalf was that the finding sought to be interfered with, after scrutiny under the forgoing searching light, should be found wholly as artificial, shocking and ridiculous. The view taken by this Court in Ghulam Sikandar v. Mamaraz Khan PLD 1985 SC 11 is well-known that "in an appeal against acquittal this Court would not, on principle, ordinarily interfere and instead would give due weight and consideration to the findings of Court acquitting the accused. This approach is slightly different from that in an appeal against conviction when leave is granted only for the re-appraisal of evidence which then is undertaken so as to see that benefit of every reasonable doubt should be extended to the accused. This difference of approach is mainly conditioned by the fact that the acquittal carries with it the two well-accepted presumptions: one initial, that, till found guilty, the accused is innocent; and two that again after the trial a Court below confirmed the assumption of innocence. This will not carry the second presumption and will also thus lose the first one if on points having conclusive effect on the end result the Court below: (a) disregarded material evidence; (b) misread such evidence; (c) received such evidence illegally". This principle was also followed in Muhammad Iqbal v. Sanaullah PLD 1997 SC 569, State v. Farman Hussain PLD 1995 SC' 1, Ghulam Sikandar v. Mamaraz Khan PLD 1985 SC 11, Ahmad v. Crown PLD 1951 FC 107, Abdul Majid v. Superintendent of Legal Affairs, Government of Pakistan PLD 1964 SC 426, State v. Bashir PLD 1997 SC 408, Muhammad Sharif v. Muhammad Javed PLD 1976 SC 452, Shahzad v. State PLD 1977 SC 413; Farmanullah v. Qadeem

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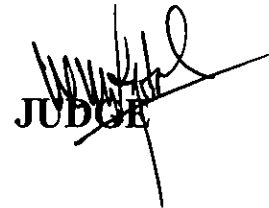
Khan 2001 SCMR 1474 and Khadim
Hussain v. Manzoor Hussain Shah 2002
SCMR 261.”

20. In view of the above, we have reached to
the conclusion that the learned trial Court has rightly
acquitted the respondent/accused vide the impugned
judgment dated 15.02.2016. We find the instant appeal
devoid of merit. It is, therefore, dismissed.

Announced
Dt: 07.09.2022



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