

JUDGMENT SHEET

PESHAWAR HIGH COURT, PESHAWAR [JUDICIAL DEPARTMENT]

Criminal Appeal No. 942-P/2020

Muhammad Khurum vs. the State.

Date of hearing 30.11.2021

Appellant (s) (by) Malik Nasrum Minallah, Advocate.

The State (by) Mr. Haider Nawaz Khattak, SPP.

JUDGMENT

MUSARRAT HILALI, J.- This criminal appeal has been directed against the judgment dated 29.09.2020 passed by learned Additional Sessions Judge/Judge Special Court, Nowshera, whereby the appellant Muhammad Khuram, was convicted and sentenced under section 9 (c) CNSA to imprisonment for life with a fine of Rs. 2,00,000/-or in default thereof to further undergo SI for six months.

2. The prosecution story, as reflected from the record, is that on 28.02.2018 at 2400 hours, on prior tip off, Muhammad Yaseen, Intelligence Officer, Custom, along with other staff intercepted the accused-appellant at Rashakai Interchange, situated in the criminal jurisdiction of District Nowshera, while trafficking huge illegal stuff, i.e., 25 k.gs chars and 3 k.gs opium, in a motorcar bearing registration No. LXL-5640 driven by him and

upon his arrest, a case FIR No. 16/2018, dated 01.03.2018, under sections 6/7/8 & 9 (c) CNSA was registered against him at police station, I & P Branch Customs House, District Peshawar. Since the vehicle in question was in the name of Saleem Shahid Hashmi, therefore, he was also arrayed as accused in the case. After completion of investigation and submission of challan, the case was tried by learned Judge, Special Court, Nowshera. During pendency of the trial, co-accused Saleem Shahid Hashmi was acquitted of the charge under section 265-K Cr.P.C while the present appellant was charge sheeted to which he pleaded not guilty and opted to face the trial. Learned trial court after recording statements of the prosecution witnesses and examination of accused-appellant under section 342 Cr.P.C, convicted and sentenced him, as referred to above, vide judgment dated 29.09.2020, hence the present appeal.

3. Arguments heard and record perused.
4. Perusal of the record would reveal that report regarding the occurrence was not recorded on the spot as the incident took place on 28.02.2018 at 2400 hours at Rashakai Interchange, District Nowshera, while report

was recorded on the following day i.e., 01.03.2018 at 11.00 hours at Peshawar. Reason for not recording the report on the spot, as given in the FIR, is that on arrest of accused and cursory inspection of the motorcar, there was no proper management for measurement of the narcotics, therefore, the motorcar was brought to the Customs Intelligence and Investigation Peshawar. When appeared as PW-2, the complainant stated in his cross examination that on reaching the office back from the place of occurrence, neither murasilla was scribed nor FIR was registered. Ishfaq Ahmad (PW-3) was present with the complainant at the relevant time, who in cross examination stated that when they came back to the office, they locked the accused in the lockup and, thereafter, went to their houses; however, the case property and accused were handed over to the security personnel present in the office.

The object of recording of murasilla or registration of FIR, apart from setting law into motion, is to provide base for carrying out investigation in the right direction. No doubt, there are no hard and fast rules as to the duration of time consumed in the registration of FIR, but such prompt measure would rule out the possibility of


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deliberation, consultation and enquiry before furnishing the information. The element of delay in lodging the crime report is treated with caution because there is a tendency to involve innocent people during the interval. The longer the intermission the greater are the chances of false implication, therefore, it is necessary for the prosecution to at least come forward with plausible explanation for the delay caused. In the instant case, the complainant Muhammad Yaseen being responsible officer, under the law, was required to have drafted murasilla, prepared card of arrest of the accused and recovery memo about seizing of the motorcar on the spot on 28.02.2018 and not supposed to postpone the process of registration of case FIR or investigation for the following day. He has not only skipped the legal and procedural course but also handed over the seized motorcar and accused to the Security Staff having nothing to do with investigation of the case, therefore, in the circumstances, there is every possibility of placing the narcotics in the motorcar during the intervening period, which aspect of the case, creates serious doubt in the story of prosecution.

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5. Another doubtful aspect of the case is that complainant in examination in chief has stated that FIR Ex PW 2/9 was drafted by him but the same has not been signed by him. The complainant has completed the entire proceedings, including registration of FIR, while sitting in his office in presence of his subordinates, who are shown marginal witnesses to the recovery memo. In the FIR, only columns of number of FIR and time of report were left blanks which columns were later on filled in with hand writing.

6. We have also observed material contradictions in the statements of PWs which further makes the case of prosecution doubtful. Complainant in cross examination stated that the information was conveyed to him by Superintendent Manzoor while Ashfaq (PW-3) in cross examination stated that Inspector Arif Ullah had conveyed the information. Similarly, the former stated that there was one secret cavity in the motorcar, while the latter stated that the vehicle was having two secret cavities. Likewise, their testimony regarding colour of narcotics was also not in line as the former stated that the colour of charas was of 'Mehendi' and the opium was

‘blackish’, while the latter stated that colour of chars and opium was ‘Khar’ ().

7. No doubt, FSL report regarding the illegal stuff available on record is in positive but the same too is undependable. In order to place reliance on the FSL report, in narcotic cases, the prosecution is required to establish the continuous chain of custody of the sample and its safe transmission to the laboratory coupled with requisite protocol by the laboratory, but in the instant case, neither the FSL report has been exhibited nor the same indicates requisite protocols nor there is any track of the samples as to how and through whom the same were transmitted to the laboratory. It has now been well settled that where safe custody of the recovered substance or safe transmission of samples of the recovered substance is not established by the prosecution, it cannot be held that the prosecution had succeeded in establishing its case against the accused. Rel: **State through Regional Director ANF v. Imam Bakhsh and others (2018 SCMR 2039)**. Similarly, in the case titled **Mst. Sakina Zaman vs. the State (2021 SCMJR 451)**, the august apex court has held that:-

“The chain of custody or safe custody and safe transmission of narcotic drug begins with seizure of the

narcotic drug by the law enforcement officer, followed by separation of the representative samples of the seized narcotic drug, storage of the representative samples and the narcotic drug with the law enforcement agency and then dispatch of the representative samples of the narcotic drugs to the office of the chemical examiner for examination and testing. This chain of custody must be safe and secure. This is because, the Report of the Chemical Examiner enjoys critical importance under CNSA and the chain of custody ensures that correct representative samples reach the office of the Chemical Examiner. Any break or gap in the chain of custody i.e., in the safe custody or safe transmission of the narcotic drug or its representative samples makes the Report of the Chemical Examiner unsafe and unreliable for justifying conviction of the accused.”

In the case titled **Khair-ul-Bashar v. the State (2019 SCMR 930)**, Hon’ble Supreme Court has held that:-

“The Report also does not signify the test protocols that were applied to carry out these tests. Hence, the mandatory requirement of law provided under Rule 6 has not been complied with and, thus, it is not safe to rely on the Report of the Government Analyst dated 18-02-2016. As a conclusion, it is reiterated, that the Report of the Government Analyst must mention (i) all the tests and analysis of the alleged drug (ii) the result of the each test(s) carried out along with the consolidated result and (iii) the name of all the protocols applied to carry out these tests.

The above view has also been reiterated in the case titled **Qaiser Javed Khan vs. The State through Prosecutor General Punjab, Lahore and another,**

(PLD 2020 SC 57) by the Hon'able the apex Court by holding that:-


“8. The report of the Government Analyst in the instant case does not specify the protocols of the tests applied and thus does not meet the requirements of the law as interpreted by this Court in the cases of Amam Bakhsh and Khair ul Bashir (supra). The said Report cannot be relied upon for the conviction of the petitioner.”


8. The crux of the above discussion is that the prosecution has not been able to bring home the charge against the appellant beyond any shadow of doubt, therefore, it would not be safe to maintain the conviction and sentences awarded to him on such evidence and that too for the offence carrying capital punishment, thus, by extending benefit of doubt, the instant appeal is allowed, consequently, the impugned judgment of conviction rendered by the learned Judge Special court is set aside and the appellant is acquitted of the charge levelled against him. He be released forthwith if not required in any other case.

Above are the reasons of short order of even date.

Announced
30.11.2021

M.Zafar P.S


JUDGE


JUDGE

(DB) Hon'ble Justice Musarrat Hilali &
Hon'ble Mr. Justice Ijaz Anwar.