JUDGMENT SHEET
PESHAWAR HIGH COURT, BANNU BENCH
(Judicial Department)

Cr. A No. 117-B of 2019

Rehmatullah
Vs.
The State

JUDGMENT

Date of hearing: **02.3.2020.**

For Appellant: **M/S ImranAli Shah & Akbar Ullah Khan Wazir, Advocates.**

For State: **Mr. Shahid Hameed, Addl: A.G.**

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SAHIBZADA ASADULLAH, J.- This judgment shall dispose of two appeals bearing Cr.A. No.117-B/2019, titled Rehmatullah Vs. The State and Cr.A. No.114-B/2019, titled Nasir Khan & another Vs. The State etc. Through Cr.A. No.117-B/2019, Rehmatullah appellant has prayed for setting aside the judgment dated 09.4.2019, rendered by learned Additional Sessions Judge/Judge Special Court, Banda Daud Shah, Karak, in case FIR No.124 dated 09.6.2017, whereby he was convicted under Section 9(C) CNSA and sentenced to rigorous imprisonment for ten years with fine of Rs.1,00,000/- (rupees one hundred thousand) or in default thereof to further undergo six months simple imprisonment. Benefit of Section 382-B, Cr.P.C. was extended to him. In connected criminal appeal No.114-B/2019, the appellants have prayed for return of flying coach bearing registration

No.R-0336/Hyderabad, which was ordered to be dealt with in accordance with law.

2. Facts of the case as spelt out from the FIR Ex.PA, registered on the basis of murasila Ex. PW 2/2, are that on 09.6.2017, complainant Saifullah Khan S.H.O (PW-2) alongwith police *Nafri* was present on the spot for snap checking, meanwhile a flying coach bearing registration No.R-0336/Hyderabad arrived from Gurguri side which was stopped on left side of the road. The driver was deboarded therefrom, who disclosed his name as Rehmatullah son of Ghulam Daud. During checking, 08 packets of Charas *Gardah* were recovered from the secret cavities designed in the rooftop of the said vehicle. On weighment, each packet stood 1285 grams, making total 10280 grams Charas. Five grams Charas was separated from each packet for chemical analysis and sealed into parcel No.1 to 8, whereas the remaining 10280 grams Charas was sealed in parcel No.9. The flying coach was taken into possession and the accused was booked for the offence vide FIR mentioned above.

3. On completion of investigation, complete challan was submitted before the learned trial Court. Accused was charged for the offence to which he pleaded not guilty and claimed trial. The prosecution in order to prove its case produced and examined as many as five witnesses, whereafter, accused was examined under section 342 Cr.P.C, wherein he professed innocence and false implication,

however, neither he opted to be examined under section 340(2) Cr.P.C., nor produced evidence in his defence. Learned trial Court, after hearing arguments of learned counsel for the parties, vide impugned judgment dated 09.04.2019, convicted appellant and sentenced him, as mentioned above, which has been assailed by the convict as well as Nasir Khan & another through these two appeals.

4. Arguments of learned counsel for the appellant and learned Addl: A.G representing the State heard and record perused with their valuable assistance.

5. It was on 09.6.2017, when complainant Saifullah Khan S.H.O (PW-2) alongwith police *Nafri* during snap checking, stopped a flying coach bearing registration No.R-0336/Hyderabad and deboarded the appellant therefrom. During checking, 08 packets of Charas *Gardah* were recovered from the secret cavities designed in the rooftop of the said vehicle, which, on weighment stood 10280 grams Charas. While going through the evidence, we have found material contradictions in the statements of the PWs besides other discrepancies in the prosecution case, which could not be highlighted by the trial Court. Saif Ullah Khan SHO, while appearing as PW-2 in the witness box though reiterated the contents of the murasila, however, he stated that he took into possession flying coach from the driver, who was not in possession of the registration book. He admitted during cross examination that he did not remember the time of

departure from police station to the spot. He stated that they proceeded to the spot from police station in official vehicle and continued checking for 30/40 minutes. This witness went on to say that he had made an entry in respect of his departure from police station to the spot in the daily diary, but the Investigating Officer neither collected nor placed the extract of the same on the police file. He admitted it correct that he had not recorded the statements of passengers or any other private witness. Contrary to the above, Muhammad Jabbar LHC (PW-1), who was allegedly present with the seizing officer, stated that the SHO went to the spot from police station in a private vehicle, which runs in contrast to what the scribe stated. We are surprised that statement of this witness, particularly cross examination seems dubious, which runs as:-

> *"First I drafted Murasila and then prepared the recovery memo in the instant case. At the time of preparation of recovery memo Jabbar LHC was present with me and had not proceeded yet to police station. I sent Jabbar LHC in a private vehicle for taking Murasila to police station. I do not remember that after how many hours the KBI incharge came to the spot".*

This witness was almost confused, as what to say and who to support and as such his testimony is not worth reliance, which speaks nothing but that this witness was not present with the SHO at the time of the alleged recovery.

Waheed ur Rehman HC, marginal witness to the recovery memo Ex. PW 2/1, appeared in the witness box as PW-3, who stated that at the time of intercepting, the flying

coach was having no passengers. Though he stated that the murasila was taken to police station by Jabbar LHC at about 4:30 p.m, however, he failed to answer that what mode was adopted by the said Jabbar LHC for taking murasila to the police station. He stated that the Investigating Officer alongwith FIR came to spot at about 5:00 p.m. He further stated that they remained on the spot for about three hours. Contrary to the above, Muhammad Naseer Moharrir (PW-4) stated that the murasila was brought to police station by LHC Jabbar at about 4:00/4:30 p.m. We are surprised to see that how could the time of collecting murasila from the spot and its handing over to the Moharrir in police station be one and the same as the police station and the spot lies at a considerable distance and this version has created a serious dent in the prosecution case.

The present case was investigated by Shad Akbar Khan SI, who was examined thrice i.e. as PW-5, RPW-2 and RPW-3, summoned on different occasions for different purposes. The Investigating Officer and the marginal witness Waheed ur Rehman did not toe the line and went apart on material aspects of the case. PW-5 stated that he reached to the spot at 1725 hours, whereas PW-3 went otherwise stating that it was 5:00 p.m. when the Investigating Officer reached to the spot. The Investigating Officer further stated that the contraband Charas was handed over to him in sealed condition, but he himself did not feel the need to see as

to whether the recovered and sealed material was Charas. He shocked us to say that the recovery memo Ex. PW 2/1 prepared by the seizing Officer tells that the Charas was in powder form, whereas according to the laboratory report the Charas recovered was in solid form, where in fact this witness had never seen the contraband in open condition so he based his assessment both on the laboratory report and the recovery memo. When this is the state of affairs, that the Investigating Officer was unaware and could not see as to whether the recovery effected from the accused/appellant was of Charas or otherwise and he based his opinion on the recovery memo which was not prepared by him but by another police official, then in circumstances the investigation so conducted will definitely lose its veracity. The Investigating Officer happily admitted that he had not weighed the contraband. The Court, on application of the appellant re-summoned the Investigating Officer to be examined on the recovery and ownership of the vehicle, who appeared as RPW-3 and conceded that he did not confirm the ownership of the vehicle.

Gul Fayz No.214, while appearing as RPW-1, stated in cross examination that on 13.6.2017, the parcels of samples were handed over to him by the Moharrir on a receipt, which is not available on Court file as well as police file.

6. The record is silent that when, how and who handed over the prepared samples and the remaining case

property to the Moharrir of the police station as the Investigating Officer did not bother to collect the abstract from the Register No.19 and we were taken aback that the Moharrir who was examined as PW-4, stated that he received only the murasila which he incorporated in the FIR, but he did not mention as to whether the case property was also handed over to him or not and his this silence confirms us that the case property was not lying in safe custody.

7. The alleged recovery was effected on 09.6.2017, whereas the samples were received in the FSL on 13.6.2017, but nothing is available on file to tell that where the samples were lying during the intervening period and even PW-4 kept mum on this aspect of the case being Moharrir of the police station. The factum of recovery is further doubted when one Gul Fayz was examined as RPW-1, who was the witness who allegedly collected the test samples from the Moharrir and handed over in the office of the Chemical Examiner. When this witness was questioned as to whether any receipt for taking the samples to the FSL was prepared and handed over by the Moharrir, he answered in affirmative, but failed to establish that the receipt was handed over to the Investigating Officer to be placed on file and even today we after thorough search did not come across the same, yet we are surprised that wherefrom this witness collected the receipt when the Moharrir of the police station when appeared as PW-4 did not utter even a single word in this respect. The overall impact of

the infirmities so erupted will put a heavy cost on the prosecution and these infirmities have crept into the roots of the case and such evidence cannot lead to conviction. We are convinced that the dispatch of the test samples from the police station to the Forensic Science Laboratory has not been established in the way and in the manner as is proposed by the law. Hence, the FSL report so tendered cannot be accepted and relied upon.

In case titled ***Kamran Shah and others Vs. The State and others (2019 SCMR 1217)***, it was held that:

> *It is not disputed that the narcotic substance recovered in this case had been recovered from some secret cavities of a vehicle in which the present appellants were travelling at the relevant time as passengers and the said vehicle was being driven by Saeed Ahmed co-convict. It was, thus, incumbent upon the prosecution to establish conscious possession of the contraband substance on the part of the present appellants but no evidence worth its name had been brought on the record in that respect. The record of the case shows that safe custody of the recovered substance at the local Police Station had not been established by the prosecution during the trial. Muhammad Afzal, Moharrir (PW3) had been produced by the prosecution before the trial Court but he had said nothing about receipt of the case-property or its safe custody by him. Even safe transmission of the samples of the recovered substance from the local Police Station to the office of the Chemical Examiner had not been proved by the prosecution.*

In this respect, cases reported as ***Abdul Ghani & others Vs. The state and others (2019 SCMR 608), The***

State through Regional Director ANF Vs. Imam Bakhsh and others (2018 SCMR 2039) and Multan Jan Vs. State (2020 P.Cr.L.J. Peshawar 88), can well be referred.

8. The Control of Narcotic Substances Act, 1997 has provided stringent punishment for those involved and also the law enforcing agencies have been put under a heavy responsibility to bring solid and material evidence against the accused and even the laboratories concerned have been provided a mechanism which they are to follow while analyzing the test samples. The law as well as the apex Court time and again emphasized that while dealing with the test samples and preparing the reports on its strength, the concerned laboratories are under heavy obligation to adhere to the procedure in this respect and especially to specify the protocols of the test applied and this is the duty of the trial Courts to examine the contents of report and to assess its evidentiary value. In case titled *Ikramullah and others Vs. The State (2015 SCMR 1002)*, it was held that:-

> *"We have particularly noticed that the report submitted by the Chemical Examiner (Exhibit-P.W.2/5) completely failed to mention the basis upon which the Chemical Examiner had come to a conclusion that the samples sent to him for examination contained charas. According to Rules 5 and 6 of the Control of Narcotic Substances (Government Analysts) Rules, 2001 a complete mechanism is to be adopted by the Chemical Examiner upon receipt of samples and a report is then to be submitted by him referring to the necessary protocols and mentioning the tests applied and their results but in the*

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case in hand we note that no protocol whatsoever was mentioned in the report submitted by the Chemical Examiner and no test was referred to on the basis of which the Chemical Examiner had concluded that the samples sent to him for examination contained charas".

9. It is turning to be a common practice with the Investigating Officers that they are lacking their interest to collect the material evidence in the cases and even no heed is paid to collect the daily diaries from the police stations regarding the arrival and departure of all concerned with the investigation of a particular case, as these are the documents which can correctly explain the status of the witnesses, their presence at the spot, the time they consume in reaching to the spot and the names of police officials who accompany. If these documents are brought on record, the Investigating Officer will lose the courage to manipulate the cases in police stations. In the present case, when the Investigating Officer was questioned regarding the arrival and departure from the police station to spot, he blatantly answered that he did not place on record the daily diary in this respect. His this lack of seriousness tells nothing but to stamp him as an interested witness and his testimony cannot wholeheartedly be relied upon. In case titled ***Pir Noroz Ali Shah Vs. The State (2019 P.Cr. L.J. 457 [Peshawar (Abbottabad Bench)]***, it was held that:

In order to establish the movement of police officials through confidence inspiring evidence, the production of daily

diary of the police Station showing the departure, constitution of raiding team, its members and subsequent arrival, was a material piece of evidence in favour of prosecution. Indeed the daily diaries are maintained under the erstwhile Police Rules 1934. Under Rule 28.48 it is mandatory for every police official to make entry of his departure, arrival and all proceedings conducted between the intervening period of departure and arrival. Non-production of the daily diary has caused serious doubts in the prosecution case regarding the mode and manner of raid.

10. To say the least, these glaring discrepancies should not have escaped notice of the learned trial Court while convicting the appellant/accused and awarding him the impugned sentences. Therefore, the impugned judgment as well as conviction and sentences awarded to the appellant/accused are not sustainable in the eye of law and invites interference. Consequently, this appeal is accepted, and the impugned judgment of the learned trial Court is set aside and the appellant is acquitted of the charges while extending him the benefit of doubt; and be set free, forthwith, if not required to be detained in connection with any other criminal case.

11. While dilating upon the facts and merit of Criminal Appeal No.114-B/2019, we noticed that the learned trial Court has not dealt with the case by applying its judicial mind to the facts and circumstances of the case and also the appellant did not assist the Court in that respect, so we deem

it appropriate to remand the case to the learned trial Court who will provide an opportunity to the appellant to produce the record in his possession on the basis of which he claims ownership of the vehicle and the learned trial Court is directed to appreciate the evidence so tendered and thereafter, decide the fate of the vehicle in accordance with law. Resultantly, this appeal is allowed and the matter is remanded back to the trial Court to do the needful within a period of one month positively after receiving record and the office is directed to transmit the record forthwith so as to be placed before the trial Court as and when available.

12. Above are detailed reasons of our short of even date.

Announced.
Dt: 02.3.2020
*Kifayat/**

JUDGE

JUDGE

06/4/2020

(D.B)
Hon'ble Ms. Justice Musarrat Hilali
Hon'ble Mr. Justice Sahibzada Asadullah

CERTIFIED TO BE TRUE COPY

Examiner
Peshawar High Court Bannu Bench
Authorised Under Article 87 of
The Qanun-e-Shahadat Ordinance 1984