JUDGMENT SHEET

PESHAWAR HIGH COURT, PESHAWAR
(JUDICIAL DEPARTMENT)

Cr.A. No. 212-P/2022

Hashmat vs. The State

JUDGMENT

Date of hearing: 15.08.2022

Appellant (s) by: Mr. Kifayatullah Shahabkhel, Advocate.

State by: Mr. Inamullah Yousafzai, AAG.

Dr. Khurshid Iqbal, J.-

1. The appellant (Hashmat) has appealed from the judgment dated 28.02.2022 of the learned Additional Sessions Judge-XV, Peshawar, by which he has been convicted under section 9-D of the Khyber Pakhtunkhwa Control of Narcotic Substances, Act, (Khyber Pakhtunkhwa Act, No. XXXI OF 2019) and sentenced to rigorous imprisonment for a period of six years and a fine of Rs. 1,00,000/- (one lac) in default whereof, he was further directed to undergo simple imprisonment for six months, with benefit of section 382-B Cr.P.C. extended to him.

2. Facts of the case, as stated in the *murasila,* are that on 21.01.2021, a police party led by Imtiaz Alam, SHO (PW.1) was on search and strike operation at *Achini Bala Nehir near Sangu Qabristan* in the locality, when it came across the appellant who was allegedly coming from Bara, District Khyber. On entertaining a suspicion about him, he was searched which resulted in the recovery of 8 packets of *chars*, each weighing 1160 grams (total 9280 grams). The seizing officer prepared a recovery memo of the contraband chars, drafted an application to the FSL. He also drafted the *murasila*, which he forwarded to the police station where the case was registered at the strength of FIR No. 91 dated 21.01.2021 under section 9-C CNSA of Police Station *Sarband*, Peshawar.

3. Investigation was entrusted to Khaista Khan, SI (PW.2). He prepared site plan, received case property, produced the accused before the Judicial Magistrate for police remand and finally sent him to the judicial lock up. He also recorded

statements of the PWs under section 161, Cr.P.C. and obtained the FSL report. On completion of investigation, *challan* was submitted before the learned Additional Sessions Judge-XV, Peshawar. Copies of the relevant documents were supplied to the accused in compliance of section 265-C Cr.P.C. Charge was framed against the accused on 03.06.2021, to which he pleaded not guilty and claimed trial.

4. The prosecution examined as many as 5 PWs. The gist of its evidence is as under: -

PWs No. and names	**Gist of statemenmt**	**Documents exhibited**
PW.1, Imtiaz Alam, DSP	Arrested the accused, recovered contraband from him, prepared recovery memo, drafted the murasila, drafted application to the FSL and prepared the card of arrest.	Ex.PW.1/1, Ex.PA, Ex.PW.1/2 and Ex.PW.1/3.
PW.2, Khaista Khan, SI	Visited the spot, prepared site plan, obtained police custody of the accused, recorded the statements of PWs and received the FSL report.	Ex.PW.2/1, Ex.PZ.
PW.3, Jaffar Shah, SI	Witness to the recovery memo	
PW.4, Wasi Ullah, Muharrar	Chalked out the FIR and kept the case property in safe custody.	Ex.PA.
PW.5, Constable Rifaz No. 5915	Took sample parcels to the FSL.	

5. At the close of the prosecution evidence, the appellant was examined under section 342, Cr.P.C. in which he was afforded an opportunity to record evidence in defence or statement on oath, which he did not avail.

6. After hearing arguments of both the parties, the learned trial Judge convicted and sentenced the appellant, as per details given in para-1 of the judgment.

7. I have heard arguments of Mr. Kifayatullah Shahabkhel, learned counsel for the appellant and learned AAG for the State and perused the record.

8. The prosecution introduced two versions of the place of the occurrence. As per the FIR story, the complainant (PW.1) arrested the appellant at *Achini Bala Nehr near Sangu Qabristan.* The IO (PW.2) and one of the marginal witnesses (ASI Jaffar Shah PW.3) introduced another version. The latter—who

accompanied the seizing officer at the time of arrest of the appellant—stated that the accused was arrested at *"Sarband Nehir canal"*. He deposed: ***"The accused reached to the Sarband Nehir at about 08:00 PM and we arrested the accused there."***

9. The former (PW.2) deposed that he reached to the spot i.e. *Sarband Nehir* within 30 minutes. He even offered an explanation, saying that the place of the occurrence is located at a distance of 1 kilometer from *Sarband Nehir*. He denied a suggestion that his explanation was an afterthought. PW.3 even went further, stating that the police party first visited *Sarband Nehir* on the place of occurrence. The site plan simply shows the presence of the appellant near the graveyard of *Sangu* and a path. It does not show the Bara road on which allegedly the appellant was coming towards *Sangu* and/or *Achini* village. Nor does it depict the *Nehr* (canal). Arguably, if at all, the *Sangu* graveyard and *Sarband Nehir* are the same place, then it should have been depicted in the site plan. Then, even the Bara road was not shown in the site plan. It is thus, not proved as to which version whether the graveyard of village *Sangu* or the *Sarband Nehir* is correct.

10. Three other aspects are worth consideration. First, the complainant stated that the police party had two mobile vans at the time of the occurrence. But in the site plan, none of the vehicles was shown. Second, the occurrence took place at 2000 hours (08:00 PM) in the month of January and the murasila was prepared at 2050 hours, whereas, the FIR was chalked at 21.10 hours. The site plan was prepared the same day, i.e. 21.01.2021, but it does not show the source of light used at that time, in which it was prepared. Third, in the site plan, the house of one Hussan Dar was shown near the place of the occurrence. The complainant deposed that the place of the occurrence is surrounded by houses. It was not explained how the complainant came to know that the house was that of Hussan Dar as no one from the locality was stated to be present. Then, other houses, as stated by the complainant, were not shown in the site plan.

11. As regards the shape and nature of the contraband *chars*, in the murasila, it was shown to be comprising of 8 packets, each weighing 1160 grams. The complainant (the seizing officer) while under cross examination expressed his lack of knowledge as to whether it was *pukhta* or *garda* chars. Of greater significance is his deposition that the contraband chars in question was one slab. Arguably, a reference may be made to the recovery memo and the FSL report, which show that 8 packets were received there. Be that as it may, the very star witness of the prosecution i.e. the complainant himself wiped out his contention by saying that the contraband chars was one slab. The complainant offered no explanation regarding one slab. Either he wanted to give a concession to the appellant or it was a mistake by a slip of tongue. The prosecutor also did not pay

any heed to this important aspect as, in case of the former situation he could have requested to the Court for declaring him hostile or in the latter case, his re-examination. Looking at this part of the statement of the complainant in juxtaposition with other evidence, it could have said that the contraband chars was either one slab or in 8 packets. The FSL report does not show the nature—*pukhta* or *garda*—of the contraband chars. PW-3, the marginal witness to the recovery memo also failed to show the exact nature of the chars. When asked whether he had seen the chars, he replied that he did have *a look* of the contraband chars at the time of the recovery. This answer suggests that he had just a cursory glance at the contraband chars. As an eye witness of the recovery, he was supposed to be fully cognizant of the incriminating material seized and sealed in his presence. The IO (PW.2) also did not sort out the contraband chars when he received it. On 23.12.2021, when his statement was recorded before the learned trial Court, he admitted that when the case property was handed over to him, he then handed it over to the *Muharrar* and that he had never seen it yet. In view of the above, the fact that the complainant and his accompanying police officials seized 8 packets of chars, stands disproved.

12. The prosecution has categorically admitted that no report was recorded in the police Daily Diary (DD) by the police contingent led by the complainant while departing from and arriving back into the police station. Rather the complainant at one place in his cross-examination stated that he had made entry in the DD regarding his departure and arrival, but at another place admitted that he made no such entry in the DD. The IO has also admitted that he has placed no DD. The learned Addl. AG argued that the placement of a copy of the DD is necessary only when a police party proceeds for conducting a raid and not otherwise. In this respect finding it hard to agree with his argument, I would like to refer to paras 22.48 and 22.49 of the Police Rules, 1934, in order to ascertain the actual legal position.

> "**22.48 Register No. II.-** (1) The Daily Diary shall be maintained in accordance with Section 44 of the Police Act. It shall be in Form 22.48(1) and shall be maintained by means of carbon copying process [...]
>
> (2) The daily diary is intended to be complete record of all events which take place at the police station. It should, therefore, record not only the movement and activities of all police officers, but also visits of outsiders, whether officials or non-officials, coming or brought to the police station for any purpose, whatsoever. [underlining supplied]
>
> (3) [...]
>
> (4) [...]
>
> **22.49 Matters to be entered in Register No. 11.**— The following matters shall, amongst other, be entered.—
>
> (a) [...]
>
> (b) [...]

(c) The hour of arrival and departure on duty at or from a police station of all enrolled police officers of whatever rank, whether posted at the police station or elsewhere, with a statement of the nature of their duty. This entry shall be made immediately on arrival or prior to the departure of the officer concerned and shall be attested by the latter by signature of seal.

(d) Every police officer of or above the rank of head constable, when returning from duty other than an investigation in which case diaries are submitted, shall have an entry made in the daily diary by the station clerk or his assistant showing the place he has visited and the duties performed by him during his absence from the police station.

(e) to (m) [...].

13. The value of recording entries in the DD was emphasized by a learned Division Bench of this Court in ***Rehmatullah vs. The State 2020 PCrLJ Note 184 [Peshawar (Bannu Bench)]:***

"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 case 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 at the time they consume in reaching to the spot and the names of police officials who accompany them. 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 v. The State (2019 PCr.LJ 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."

14. Another key aspect of the case is that the complainant—Imtiaz Alam—after having sealed the chars during the recovery proceedings put a seal on the parcel with a monogram that carried the letters 'LS'. He admitted that the aforesaid letters are not the initials of his name. He offered no explanation. In ***Akhtar Iqbal vs. The State 2015 SCMR 291***, the seizing officer had used the monogram of another police official and did not explain as to why "**he had not**

put his own monogram on the seals of the parcels prepared by him [...]". [p291]

15. In compliance with the direction of the Hon'ble Supreme Court of Pakistan in its order dated 12.05.2020, in Criminal Petition No. 419 of 2020, the National Police Bureau and Ministry of Interior, Government of Pakistan has published a "Hand Book of Criminal Investigation in Pakistan, 2021". In the Hand Book, the following instructions have been laid down in respect of monogram:

> Seals must display the date when sealed. They must also be tamper evident, this means that if seals are opened or tampered, it becomes visibly evident. The seal must display the initial of the personnel creating it. [...p50]. The evidence be labeled and property with at least case number and item number [...p163]. The labels should also have a seal; the same which was used in the fastening of the container. Seal should all be similar and the wax would be of the same kind. It should be the ordinary office seal and should be kept under lock and key [p170].

16. There is evidence that the police contingent led by the complainant left the police station twice; once, when it had left the police station and arrested the appellant, and another, when it came back to the police station, brought the appellant in custody and left again for the purpose of a search and strike operation. In the earlier round, the complainant sent the *murasila* to the police station through constable Javaid. When he reached to the police station, he saw constable Javaid there. When asked, whether constable Javaid accompanied him on the search and strike operation, he failed to recall that constable Javaid accompanied him on the search and strike operation. There could have been an explanation whether he accompanied constable Javaid on the first departure or on the second one from the police station. By offering no explanation, he made questionable as on which search and strike operation, constable Javaid accompanied him. The prosecution also did not attend to this fact by making a request to the learned trial Court for re-examination, nor did it produce constable Javaid to clarify this position. One may argue that the deposition of Muharrir Wasiullah (PW.3) sufficiently answer this question. The significance of this aspect lies in the facts that all prosecution witnesses are police officials; a copy of the DD was not produced, nor was any independent witness associated in the case. In this perspective, the entire evidence need to be examined carefully and cautiously, most particularly when huge quantity of contraband chars are alleged to have been found in possession of the appellant. In case of ***Munir Hussain alias Munawar alia Muno vs. The State,*** reported as ***2019 YLR 51 [Sindh (Sukkur Bench)]***, it was held that while there is no doubt that police officials are good and independent witnesses and their evidence may be relied upon in

recording conviction, it is also an established principle that such witnesses must be trustworthy and confidence inspiring.

17. As discussed above, the IO didn't check the contraband chars. Nor did he conduct any meaningful investigation into the allegations on basis of which the case was registered. Reference may be made to Rule 25.3 (3) of the Police Rules which state:

> **"25.2 Powers to Investigating Officers.-(1)** [...]
> **(2)** [...]
> **(3)** It is duty of an investigating officer to find out the truth of matter under investigation. His object shall be to discover the actual facts of the case and to arrest the real offender or offenders. He shall not commit himself prematurely to any view of the facts for or against any person."

18. The IO is not obliged to limit investigation to the bald assertions made in the FIR and then lead evidence to that extent only. In other words, his job is to discover the truth and reality of the version jotted down in an FIR. The record shows that almost all the investigation was conducted by the raiding and arresting police officer (PW.1), who is also complainant in the case. Legally, another police officer from the investigation branch was supposed to conduct the investigation.

19. The IO in instant case, did not, for example, record statement of any independent person despite the fact that a house of one Hassan Dar was shown in the site plan and the complainant deposed that there are houses near around the place the occurrence. He collected no evidence worth the name whether the appellant was previously involved in such like cases, or was a seller of contraband chars, or had any clients in the locality, or was really coming from Bara town. Nor did he probe as at which particular place the appellant was in fact arrested. Indeed, what the complainant had done on the spot the IO simply took it for granted. The separation of investigation from other functions of the police (see Section 26 of the Khyber Pakhtunkhwa Police Act, 2017) was not without plausible justification. In case of ***Taj Wali and 6 others vs. The State,*** reported as ***PLD 2005 Karachi, 128***, it was held as under:

> "---The offence involves capital punishment and the case rests upon only ANF officials, therefore, heavy responsibility lies upon the prosecution to produce a solid piece of evidence, which eliminates all possibilities of false involvement of an accused person, and the evidence should be free from all doubts. In these types of cases, the Court should also scrutinize the evidence very minutely. If a single doubt appears in the evidence, then it should be liberally given to the accused, because it is very easy to involve an innocent person in these types of cases as all the witnesses are invariably police witnesses and subordinate to the complainant who is also invariably an Investigation Officer. The complainant is highly interested in the case as he had detected the offence and would like to see that the accused should be convicted therefore he should not be made the

judge of his own cause. As such his version should be investigated by another officer, which will ensure the fair investigation of the complaint of the complainant. [pp140-141] (underlining supplied)

20. To sum up the above discussion, the prosecution has failed to prove the exact place of the occurrence. The eyewitness to the recovery of the contraband chars was not proved to have meaningfully seen the case property at the time of the recovery. The exact shape of the contraband chars was negated by the complainant/seizing officer. The copy of the DD was not placed on the record to prove that the police party was in fact on a search and strike operation, notably in the first round in the circumstances of the case. The initials of the monogram not being compatible with the name of the complainant/seizing officer, no explanation, let alone a plausible one, was offered. Above all, the IO simply and solely toed the main line, the complainant/seizing officer had drawn in the first report of the occurrence. The IO did not see the case property even at the time of recording his statement before the trial Court. In other words, he simply took it for granted, blindly subscribing to the assertion made by the complainant/seizing officer in the first information of the occurrence. Thus, the prosecution case suffers with material doubts. It is an established principle of law that even a single reasonable doubt is enough to acquit an accused person. As regards, the argument of the learned AAG regarding imposition of lesser fine than the mandatory minimum as per section 9-C, since the prosecution has failed to prove the charge, I hold that is not necessary at all.

21. In view of the above, appeal is allowed and the appellant Hashmat son of Ateeq Ullah is acquitted from the charge leveled against him. He shall be sent free forthwith, if not required to be detained in any other case.

22. These are the details reasons of my short order of even date.

Announced
15.08.2022
Abdul Ghaffar

JUDGE

(SB) Hon'ble Mr. Justice Dr. Khurshid Iqbal, J.