JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT, PESHAWAR

[JUDICIAL DEPARTMENT]

Criminal Appeal No. 41-P/2021

Naveed Daud…….vs…….. The State.

PRESENT;-

For the appellant:- Malik Nasuminallah, Advocate.

For the State. - Mr. Atif Ali Khan, AAG.

Date of hearing. …… **09.07. 2021.**

J U D G M E N T

MUHAMMAD NAEEM ANWAR, J.- On 14.10.2015, Ameer Khair ul Basher ASI (PW-06) along with other police party had arranged 'nakabandi' at Jamrud Road and was present there when received information regarding transportation of huge quantity of narcotic from Jamrud to Peshawar in a motorcar bearing registration No. 5650/IND, so, acted upon the information, he started surveillance of the road. At 17.00 hours, the spotted motorcar appeared which was stopped. Driver of the motorcar disclosed his name as Naveed Daud (the appellant). From secret cavities of the motorcar, the police recovered thirty (30) packets chars, total weighing 36 kilograms, consequently, a case vide FIR No. 1433, dated 14.10.2015, was registered against the above named accused at Police Station, Hayatabad.

2. After registration of the case and completion of investigation, the accused-appellant was sent to the court of learned Judge, Special Court/MCTC, Peshawar, for trial, who on its conclusion, convicted and sentenced him to imprisonment for life with a fine of Rs. 2,00,000/- or in default

thereof to undergo further six month SI with benefit of section 382-B Cr.P.C, vide judgment dated 09.01.2021.

3. The appellant-accused has now challenged the validity and legality of his conviction and sentences by filing the instant criminal appeal under section 48 of the Control of Narcotic Substances Act, 1997, **'(Act, 1997)'** read with section 410 of the Code of Criminal Procedure, 1898, on the ground that not only there are glaring contradictions in the testimony of the prosecution's witnesses creating reasonable doubts as to the prosecution story but the FSL result is also invalid because the Government Analyst, who had conducted the test and furnished his opinion was not qualified in terms of section 35 of the Act, 1997 and rules made thereunder, but these vital aspects of the case have been ignored by the learned trial court.

4. We have heard arguments of learned counsel for the appellant and learned AAG appearing on behalf of the State and perused the record.

5. The allegation against the accused-appellant is that he on 14.10.2015 was trafficking thirty six (36) k.gs chars in his motorcar bearing registration No. 5650/IND from Jamrud to Peshawar but the evidence produced by the prosecution reveals that neither the motorcar was registered in his name, nor a driving license was taken into possession from him, thus, it is repellant to the common sense that without having a driving license a person would drive a vehicle and that too without proper documents from Jamrud to Peshawar, which aspect of the case has created a reasonable doubt in the prosecution case. There are also material discrepancies in the statements of the

prosecution witnesses which also give a hint that the prosecution case is not free from doubt, i.e. as per contents of the FIR, the Murasilla was sent through Samin Ullah constable to the Police Station for registration of the case, which fact has also been confirmed by Izhar Ullah Inspector (PW-4), who in cross examination stated that only Murasilla was handed over to him and nothing else. Muhammad Zahir (PW-5) was present with the complainant at the time of recovery and also cited him as one of the marginal marginal witnesses to the recovery memo Exh.PW 5/1 has stated in his cross examination that the complainant after preparing Murasilla and recovery memo, handed over the same to Tehseen Ullah (Samin Ullah) constable for onward submission to the Police Station and he went to the Police Station in a private taxi but testimony of the above witnesses were contradicted by the complainant when appeared as PW-6 by stating in his cross examination that he and Samin Ullah Constable had taken the case property, Murasilla and accused to the Police Station and handed over the same in the Police Station. Besides the above, the occurrence, as per contents of the FIR, had taken place on 14.10.2015 at 17.00 hours (5.00 p.m), report/murasilla was drafted at 17.30 hours, while FIR was chalked out at 17.50 hours (05.50 p.m). Muhammad Zahir (PW-05) stated in cross examination that distance between police station and place of nakabandi was two kilometers. He stated that Constable Tehseen Ullah, who had taken murasilla to the Police Station, came back to the spot after thirty minutes before the arrival of the I.O to the spot. He further stated that the I.O visited the spot after about one hour

and consumed about 30 minutes on the spot, while the I.O stated in his cross examination that he spent two hours on the whole spot proceedings. In the last lines of cross examination, the said PW stated that after 06.00 O'clock he changed his uniform and had gone to the PP as his duty time was closed at that time. When FIR was chalked out at 05.50 p.m and after its registration, it might have been handed over to the I.O at 06.00 p.m for investigation then how he was present at the spot at the time of arrival of the I.O as according to his statement after 06.00 O'clock he changed his uniform and had gone to the PP as his duty time was closed at that time. The discrepancies highlighted above further making the case of the prosecution suspicious.

6. Likewise, all the three important witnesses of the prosecution, viz, complainant, I.O and marginal witness to the recovery memo during the course of recording their statements before the trial court were oblivious as to departure from the police station and arrival back to the Police station nor there are any written diaries in this respect. PW-3, the I.O, stated in his cross examination that when they left Police Station for official duty, entries in this respect are made in daily diary, however, he admitted as correct that the said daily diary is not available on file. This court in case titled **Pir Noroz Ali Shah v. The State (2019 P.Cr.LJ 457)** has 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."

7. Also, PW-3 in his statement stated that he did not know as to who had accompanied the I.O to the spot. Similarly, Muhammad Zahir PW-5 stated that the I.O was accompanied by a single constable, however, showed his ignorance about the name of the said constable. He was also unacquainted as to whether the I.O had come to the spot in vehicle or by foot. He stated that the complainant had visited the Police station but he could not recall the time. He was also unaware that after how much time the complainant left the spot for Police Station. The complainant (PW-6) also showed his ignorance on certain material points. He stated that the I.O had come to the spot but showed unawareness after how much time he visited the spot. Even, he could not recall the number of police officials accompanied by the I.O. He also did not call to mind that as to which time he returned from the Police station to the spot after handing over murasilla and case property in the Police Station. So, the above substantial loopholes appearing in the statements of the star witnesses of the prosecution, particularly, lack of knowledge by the PWs on certain realities, which they ought to have reminisced, lead one to the conclusion that the prosecution has failed to establish its case against the appellant beyond reasonable doubt.

8. There is another damaging aspect of the case, which is the legality and validity of the FSL report relied by the prosecution. Muhammad Riaz (PW-2) though stated in his examination in chief that he was handed over parcels No. 1 to 30 yet did not name the person who had handed over the same to him. He, though, during cross examination stated that the samples were handed to him by the complainant but there is no application for sending the samples to the lab. Likewise, as per record, the occurrence took place on 14.10.2015 while the samples were delivered in the Lab on 19.10. 2015, after the delay of about five days, whereas the same were required to have been sent to the FSL within 72 hours of its seizure as required by Rule 4(2) of the Control of Narcotic Substances (Government Analysts) Rules, 2001. Also, the tests on samples were carried out by the Chemical Examiner, namely, Mohammad Zeb Khan, who was not qualified to be termed as a Government Analyst within the meaning of section 35 of the Control of Narcotic Substances Act, 1997 and the rules framed thereunder, thus, he was declared so, vide notification dated 05.08.2009, with retrospective effect. When the person who furnished opinion and analyzing the samples was not qualified to be termed as a Government Analyst under section 35 of the Act, 1997 and rules framed thereunder then such report, even if it be in positive, is of no avail to the prosecution as it cannot be relied upon.

9. Learned AAG submitted that since the person who furnished opinion on the samples was not possessing the prescribed qualification and could not be termed as

Government Analyst in term of Section 35 of the Act, 1997, therefore, remand of the case back to the trial court is inevitable in order to get fresh samples from the recovered illegal stuff and get them examine through Chemical Examiner duly appointed under section 35 of the Act, 1997 in light of judgment of this court reported as **2011 P Cr. L J 1203, 2015 MLD 518 and 2015 P.Cr.L J 1108.** This argument of the learned AAG, in our view, has no force because it amounts to giving the prosecution a chance to fill the lacunas in the report of FSL. Hon'ble apex court in case titled **Khair ul Bashar vs. the State (2019 S C M R 930)** has held that:-

> "6. Re-testing of the drug, as argued by the DPG, in case of a deficient report would amount to giving a premium to the prosecution for its mistakes and lapses. In any case any flaw in the case of the prosecution must only benefit the accused. Sending the alleged drugs for re-testing would be giving another chance to the prosecution to build its case, which is not the role or business of the court. Besides, there is a likelihood that the chain of custody of the alleged drug is compromised with the passage of time.."

Similarly, in the case of **Muhammad Naeem vs. the State and others (2019 SC 669)** the Hon'ble the apex court observed that:-

> The court being a neutral arbiter has to dispassionately appreciate, appraise, examine and weigh the evidence placed before: it, rather than by ignoring the evidence and embarking on a probing journey guided by emotions, sentiments arid sense of self-styled justice pegged on the lofty notion of societal reform. In an adversarial system the role of the judge is that of a neutral umpire, unruffled by emotions, a judge is to ensure fair trial between the prosecution and the defence on the basis of the evidence before it. The judge should not enter the arena so as to appear that he is taking sides. The court

cannot allow one of the parties to fill lacunas in their evidence or extend a second chance to a party to improve their case or the quality of the evidence tendered by them. Any such step would tarnish the objectivity and impartiality of the court which is its hallmark. Such favoured intervention, no matter how well-meaning strikes at the very foundations of fair trial, which is now recognized as a fundamental right under Article 10-A of our Constitution.

6. In the present case the direction of the High Court for obtaining fresh samples of the alleged intoxicating substance and preparing a fresh report of the Chemical Examiner amounts to granting the prosecution a premium on its failure to put up a proper case in the first instance. Such judicial intervention is opposed to the adversary principle and offensive to the fundamental right of fair tria1 and due process guaranteed under the Constitution. see Dildar v. State; Painda Gul v. State and State v. Amjad Ali.[16] The High Court has travelled beyond its lawful powers under section 423(1)(a) Cr.P.C. and has in fact directed to conduct re-investigation or further investigation of the case, which is not permissible under the law. Even otherwise, calling for fresh examination of the intoxicating substance at the appellate stage after all these years may frustrate the settled law as to safe custody and safe transmission of the recovered substance making the report of the chemical examiner suspect and unreliable.

Again, in the case titled **Qaiser Javed Khan vs. the State (PLD 2020 Supreme Court 57)** the august Supreme Court of Pakistan has held that:-

" Once the above three requirements under Rule 6 are contained in the Report of the Government Analyst, any ambiguity therein may be resolved by the Trial Court by exercising its power under Proviso to section 510, Cr.P.C. The said provision states that the Court may, if it considers necessary in the interest of justice, summon and examine the person by whom such report has been made. Therefore, the Trial Court while examining the said Report has the

power to summon the Government Analyst in case there is any ambiguity in the said Report and seek clarification thereof. This clarification can only be based on the existing record of the Government Analyst and does not mean to allow the Government Analyst to conduct a fresh test or prepare another Report, for that would amount to giving the prosecution a chance of filling the gaps and lacunas in the Report."

10. Thus, in view of the above stated reasons, it would not be safe to maintain the conviction and sentences of the appellant on such a scanty evidence and invalid report of FSL and that too for the offence carrying capital punishment, therefore, for the reasons discussed above, 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, therefore, 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.
09.07.2021

M.Zafral P.S

J U D G E

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DB (Hon'able Mr. Justice Syed Arshad Ali and
Hon'ble Mr. Justice Muhammad Naeem Anwar.