

Judgment Sheet

**IN THE PESHAWAR HIGH COURT,
PESHAWAR**

Judicial Department

**Cr.A No. 1342-P/2019
Mst. Robina Vs the State**

Date of hearing: 04.12.2019.

Appellant by: Mr. Haq Nawaz Khan, Advocate.

State by: Mr. Jawad Ali, AAG.

JUDGMENT

AHMAD ALI, J. The appellant (Mst. Rubina w/o Ghulam Murtaza) through the instant appeal has questioned the judgment of the learned Additional Sessions Judge-IV/Judge, Special Court, Nowshera, dated 28.10.2019, delivered in case FIR No.26 dated 23.03.2019 under section 9-C CNSA, PS, Railway Police Peshawar Cantt, whereby she was convicted and sentenced to three years RI with fine of Rs.50,000/- or in default thereof to suffer six months S.I. Benefit of Section 382-B Cr.P.C. was, however, extended to her.

2. Brief facts of the case, as per contents of FIR, are that the complainant alongwith another police official was present on checking duty at the platform of Railway Station Jehangira. At the time of arrival of train (Rahman Baba 48DN) at 1050 hrs, besides other

passengers, a woman was sitting on a bench. On query, she disclosed her name as Rubina w/o Ghulam Murtaza (present appellant). A white colour bag was lying with her on the bench. Upon checking, two packets of charas were recovered lying inside the bag. The accused-appellant was taken to reporting room and the high-ups were informed accordingly and on their arrival, her personal search, through a lady constable, led to recovery of four more packets of charas from her worn jacket. Each packet turned out to be of 1200 grams, thus, total 6 packets, weighing 7200 grams, of contraband were recovered from the accused-appellant. She was arrested and FIR ibid was registered accordingly.

3. On completion of investigation, complete challan against the accused-appellant was submitted in Court where she was charge-sheeted, however, she pleaded not guilty and claimed trial. The prosecution in order to prove its case, produced and examined as many as **six** witnesses whereafter statement of the accused was recorded, wherein, she professed her innocence.

4. The learned Trial Court, after conclusion of trial, found the appellant guilty of the charge and, while recording conviction, sentenced her as mentioned above. Feeling aggrieved, the appellant has filed the instant appeal before this Court

5. Arguments heard and record gone through.
6. Allegation against the appellant is that, 7.2 kgs of charas were recovered from her bag, when she was waiting for the train.
7. Perusal of record of the instant case unfolds that the occurrence took place at 1050 hrs whereas murasila was received in the police station at 1730 hrs, after a considerable delay of about 7 hours which went unexplained. Astonishingly, the record further suggests that all the investigation was conducted before lodging of FIR.
8. It is alleged by the prosecution that complainant/ PW-4 recovered two packets of contraband from the bag of accused-appellant lying at bench at a public place in presence of one Shaida Muhammad Constable, but surprisingly, said constable neither made witness to the recovery memo nor was produced during trial in support of the version. The situation not only hits Article 129(g) of the Qanun-e-Shahadat Order 1984, but also hint at the legal inference that if said witness was entered into the witness box, he would have not supported the prosecution's version. It is also evident from the record that no independent witness has been associated with the recovery process. Even, the complainant/PW-4 did not bother to associate other police officials as witnesses,

present in said police post, as is clear from the statement of PW-3/SHO. We are afraid to note that the complainant himself stood one of the marginal witness to the recovery memo (Ex.PW3/2). Same is the position of PW- 5/Salma, the 2nd marginal witness thereto.

9. Generally, any railway station is always crowded with passengers etc. Some people arrive, while some people wait to depart. This fact went unattended during trial that when the complainant left the checking point and proceeded towards the accused-appellant whether anyone else was present for checking of other passengers or not. In the stated situation, it also does not appeal to the prudent mind that why the accused-appellant was sitting in a visible bench near the checking point, having narcotics hidden in bag as well as in worn jacket. When the purpose was clear and the consequence well-known, why the accused-appellant kept/hidden the narcotics separately.

10. So, far as recovery of 04 packets of charas from the worn jacket of the accused-appellant is concerned, in this respect the cross examination of PW-3 is very important and necessary to be gone through. It seems that this witness was having butterflies in his stomach. The relevant portion(s) is reproduced below for ready reference:

“XX.....It is correct that the Banyan/jacket bears no FIR number nor any date. It is correct that such like jackets are usually available in markets.....The accused remained in our custody till her handing over to women police station Peshawar. I have not produced the accused facing trial for obtaining her police remand/custody. It is correct the Ex.PW-3/6 is in my hand writing but I did not produce myself the accused facing trial before the Court of Judicial Magistrate, and was produced by Muhambar Khan SI before the Illaqa Magistrate.....It is correct that in the calendar of witnesses the name of Muhambar Khan is not mentioned. It is correct that the bag bears the name of the accused, Fir number and section of law but not the date of occurrence. It is correct that in the statement of HC Nasir Khan nowhere it is mentioned that at which point the accused body search was made nor it has been mentioned in his statement recorded by me that separate management was made for her body search..... We are having two female police constables deputed at Railway Police Post Nowshera. At the time of receiving information I was not accompanied by lady constable Mst. Salma.....No one except the accused facing trial was present on the spot.....No information except the two packets already recovered from the possession of the accused was given to us. Only lady constable was present at the time of making body search of the accused facing trial and was made inside the help centre.....The constable Salma, produced to me the remaining recovered contraband.

11. Be that as it may, suffice it to say that when the officials who recovered the contraband themselves stood the witnesses then, the controversy remained unresolved that who substantiated their versions qua the separate

recoveries made by them from the accused-appellant. Guilt of any accused is not only required to be supported by the testimony of complainant but also required to be substantiated by other unimpeachable, irresistible, circumstantial and independent evidence. Unfortunately, the present case badly lacks such evidence. Statement of PW-3 and the facts depicted from the record suggest that the recovery, in the mode and manner, as narrated by the prosecution seems to be seriously doubtful and not appealable to the general prudence, rather concocted and fabricated.

12. Moreso, statement of PW-3 also does not transpire that to whom he handed over the case property and samples for keeping the same in safe custody. PW-1 deposed during course of trial that;

“During the days of occurrence I was posted as Moharrir in Police Station Railway Peshawar Cantt. On receipt of murasila sent by Javed Khan Inspector/SHO through Khalid Nawaz constable NO. 398. I correctly incorporated its contents in the shape of FIR. Today I have seen the FIR Ex.PA which is correct and correctly bears my signature.”

Whereas PW-6 deposed in the following manner;

“During the days of occurrence I was posted as Moharrir in Police Post-Railway Nowshera. On 27.03.2019, I sent 06 parcels/samples to FSL for chemical examination through constable

Muhammad Yaseen No. 228. In this respect I received Raseed Rahdari/road certificate which is Ex.PW-6/1.”

The statements of above mentioned important witnesses suggest that PW-1 has not received any case property with the murasila. Statement of PW-6 also does not suggest that from whom he received the samples for handing over to Muhammad Yaseen # 228/PW-2. Therefore, in the situation explicit manipulation with the case property and samples cannot be ruled out. The learned trial Court totally ignored this important aspect of the case and blindly held the accused-appellant responsible for the episode.

13. There is no record or any assertion that the samples and case property were ever kept in Malkhana. Had it been, the Register No.19 would have been produced and, at least, the relevant page having the entry, exhibited. In the scenario, the safe custody of the samples and case property is not proved. We are forfeited to seek guidance from the case law reported in **2019 SCMR 608** wherein it was held by the apex Court that;

“In a case where safe custody of the recovered substance or safe transmission of samples of the recovered substance was not proved by the prosecution through independent evidence, it could not be concluded that the prosecution had

succeeded in establishing its case against the accused beyond reasonable doubt”.

Similar views have also been taken by the apex court in **2018 SCMR 2039, & 2019 SCMR 903.**

14. The record is further suggestive of the fact that the contraband was recovered on 23.03.2019 and samples were received in FSL on 27.03.2016, with a considerable delay of 4/5 days. Such delay was, however, not explained by the prosecution during trial. In case titled **“Ikramullah and others Vs the State reported in 2015 SCMR 1002”** it has also been held by the apex Court that;

“No such police official was produced before Trial Court to depose about safe custody of samples entrusted to him for being deposited in office of Chemical Examiner---Prosecution was not able to establish that after alleged recovery of substance so recovered was either kept in safe custody or that samples were taken from recovered substance had safely been transmitted to office of Chemical Examiner without the same being tampered with or replaced while in transit---Prosecution failed to prove its case against accused persons beyond reasonable doubt”

Likewise, in case reported in 2012 SCMR 577 it has also been held by the august Supreme Court of Pakistan that;

“Although prosecution sought to corroborate testimony of recovery witnesses with report of Forensic Science Laboratory to the effect that contraband item recovered from secret cavities were charas, yet sanctity of report of Laboratory was eroded by evidence of official who could not be correctly reply as to where samples remained between the dates when those were allegedly taken into possession from car and the date those were received by Forensic Science Laboratory ”.

15. In present case, where the recovery is doubtful and safe custody of the recovered substance as well as samples thereof is not established by the prosecution through cogent evidence, there it cannot be said with confidence that the prosecution had proved its case against the accused-appellant beyond reasonable doubt.

16. Keeping in view the contradictions on certain material points occurred in the statements of PWs and handling of the contraband as hinted above created serious doubts in the prosecution case qua its recovery and safe custody, which suggests that occurrence has not taken place in the mode and manner as alleged by the

prosecution. Wisdom can be derived from the case law reported in **2019 SCMR 608**.

17. The above discussion has led this Court to believe that the learned trial court has erred in appreciating the case evidence in its true perspective. It has been held, time and again by the superior courts, that a slightest doubt occurs in the prosecution case is sufficient to acquit an accused. For extending the benefit of doubt, it is not necessary that there should be many circumstances creating doubts. Single circumstance, creating reasonable doubt in the prudent mind about the guilt of accused, makes him entitled to its benefit, not as a matter of grace or concession, but as a matter of right. Reliance could be placed on **2009 SCMR 230, 2011 SCMR 664, 2011 SCMR 646, 1984 PLD SC 433, 2012 MLD 1358, 2007 SCMR 1825, 2008 P.Cr.L.J 376, 1994 PLD Peshawar 114, 2012 PLD Peshawar 01, 1999 P.Cr.L.J 1087, 1997 SCMR 449, 2011 SCMR 820 & 2006 P.Cr.L.J SC 1002**. The conclusions drawn by the learned trial Court are not borne out of the case evidence, therefore, the impugned judgment is not sustainable.

18. For what has been discussed above, it is termed that prosecution built its case on sand and made bricks without straw. Therefore, while extending benefit of

doubt to the appellant, we have no hesitation to accept the instant appeal. Consequently, the appeal in hand is allowed, the impugned judgment is set aside and the appellant is acquitted of the charge levelled against her. She be set at liberty forthwith, if not required to be detained in any other case.

19. Above are the reasons of short order of even date.

Announced
04.12.2019

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