

JUDGMENT SHEET

**IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)**

Cr.A No. 173-M/2022

Malak Aman(Appellant)

vs

The State.....(Respondent)

Present: Mr. Aziz ur Rahman, Advocate for the
appellant.

Mr. Saeed Ahmad, Asst:A.G for the State.

Date of hearing: 08.12.2022

JUDGMENT

Dr. Khurshid Iqbal, J.-

1. Malak Aman, the appellant, has called into question the order/judgment of the learned Additional Sessions Judge /Judge Special Court/ Izafi Zilla Qazi Malakand at Dargai, dated 27.05.2022, whereby he was convicted and sentenced to six (06) years rigorous imprisonment alongwith fine of Rs. 500,000/- under section 9 (d) Khyber Pakhtunkhwa Control of Narcotic and Substances Act, 2019 (the "Act").

2. According to the contents of F.I.R, on 22.08.2021, Imtiaz Ahmad IHC, the complainant (PW-4), along with other police officials namely Fakhr-ul-Islam, Driver Hamid-ur-Rahman, Muharrir Ishaq Anwar were present on patrolling duty at

Shangrai Chowk under the supervision of Naib Subidar namely Khan Ali. Pursuant to receipt of spy information to the effect that a huge quantity of charas is smuggling from District Mardan to District Malakand through a Datsun bearing registration number KV-4539. In view of the above, they put barricades there and meanwhile at 11:45 the said Dotson came there, which was signaled by the complainant to stop. On query the driver of the vehicle told his name Malak Aman resident of Mitha Khail, Yar Hussain District Swabi. During checking five packets duly folded in a yellow scotch tape were recovered from behind the driver seat, which on further checking found to be charas. On weighment through digital scale, each packet was found to be 1200/1200 grams while total aggregated to be 6000 grams. From each packet 10/10 grams charas were separated through knife for FSL analysis and sealed into separate parcels No.1 to 5, while the remaining 5950 grams contraband were sealed into parcel No.6. All the parcels were sealed and seal "IZ" was affixed. During cursory interrogation, on the spot, the accused told that the recovered charas were the ownership of one Asif alias Mati Ullah son of Abd Ullah resident of Korgh Chowk, district Mardan. The appellant was arrested on the spot.

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3. After completion of investigation, challan was submitted against the appellant before the learned trial Court. Copies were supplied to him under section 265-C Cr. PC. Charge was framed against him, to which he pleaded not guilty and claimed trial. However, proceedings under section 512 Cr. PC were initiated against the accused Mati Ullah.

4. The prosecution examined as many as seven (7) witnesses. Statement of the appellant was also recorded under section 342 Cr.P.C, in which he was afforded an opportunity of evidence in defence and/or statement on oath but he did not avail it.

5. After hearing arguments of the learned A.P.P and learned counsel for the appellant, the learned trial judge, vide the impugned judgment dated 27.05.2022 convicted and sentenced the appellant as mentioned in para-No.1 of this judgment.

6. I have heard arguments of learned counsel for the appellant, as well as the learned Assistant A.G for the State and perused the record.

7. From the evidence of its star witnesses—IHCs Imtiaz Ahmad and Fakhr-ul-Islam and driver Hamid-ur-Rahman (PWs 4, 5 and 6)—the prosecution endeavoured to prove the charge against the appellant.

The depositions of these PWs evince that on 22/08/2021, the eventful day, a Levy contingent led by Subedar Ali Khan, the Post Commander of Kopar, Malakand District, was on its routine patrolling duty in the locality when it got spy information that narcotics in huge quantity were being smuggled from Mardan to Malakand. The contingent laid barricade on the road. At 11.45 am, a datsun pick up bearing registration # KV 4539 came there from the area of village Badraga. The datsun pick up stopped at the barricade in response to the signal of the levy personnel. PW4 Imtiaz Ahmad led the search and the recovery proceedings. The driver disclosed his name as Malak Aman (appellant), a resident of village Methakhel Yar Hussain, District Swabi. From underneath the driver seat of the datsun pick up five packets of chars were found. Each packed on being weighed was found to be 1200 grams (total 6000 grams). From each packet 10 grams as representative sample was separate for the purpose of chemical analysis. The Each sample and the remaining were put in 06 parcels on which seals bearing initials "IZ" were put. PW4 prepared a memo of the recovery and cited PW5 Fakhr-ul-Islam and Madad Muharrir Ishaq Anwer as it marginal witnesses. He cursorily interrogated the appellant. The latter told that the charas was owned by a Matiullah alias Asif son of



Abdullah, a resident of Koragh Chowk in Mardan. PW4 then prepared wrote the report of the incident in the shape of a murasila and forwarded it through driver PW6 to the Levy Post of Kopar for registration of the case. The case in hand was registered at the strength of FIR # 86 the same day against the appellant and Matiullah alias Asif under sections 9 (D) and 17 of the KP CNSA 2019. PW4, who conducted the seizure, thus stood as the complainant of the case.

8. PWs 4, 5 and 6 candidly retold the above story of the case, fully verifying the details of the search and seizure proceedings, including most notably the recovery. These PWs were cross examined by the counsel for the appellant. Numerous questions were asked from PW4 under cross examination. Key questions include the presence of the Post Commander on the crime scene; the exact place of the patrolling; the place at which the informer's passed on the information; the time before the incident; the order in which the search and seizure was carried out; the presence of the private person near around the crime scene; and the monogram on the seal. PW4 replied that the Post Commander was present on the crime scene at the relevant time; he couldn't recollect the exact place of the contingent's presence when the information was

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received; he stated the sequence of the recovery proceeding; he showed the time before the incident as 02 hours patrolling; he admitted the crime scene a public place and the initials "IZ" on the monogram. No substantially contradiction could be created as to the presence of the contingent, the arrival of the appellant at the crime scene and the recovery of the contraband charas. All of the above referred key and other questions even if answered in the negative could not be seen as dents as substantial as to pull down the prosecution case.

9. A couple of aspects, however, may be touched. First, even after its merger in the Khyber Pakhtunkhwa province under the 25th Constitutional Amendment, the levy still continues to work as police force. The presence of the Post Commander and the investigation by criminal cases by the members of the operation wing of the levy force continues. Second, the association of the private persons with the recovery would have lent greater credibility to the recovery. However, it is not a requirement of the law where personal search is conducted. Third, PW4 admitted that he didn't send the case property along with the murasila to the Levy Post. Fourthly, on the request of the learned defence counsel, the learned trial Court

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opened the parcels containing the contraband charas. The learned defence counsel proved unsuccessful to create a material doubt from the parcels. Rather, while examining the parcels, the learned trial Court recorded its observations to the effect that the numbers of almost the all of them were found proper and correctly numbered.

10. The record shows that the seizing officer himself took the case property to the Levy Post and handed it over to the Muharrir there. Legally, compliance of section 103, Cr. P.C is not mandatory in narcotics cases. The learned Assistant Advocate General informed that the policing duties are still performed by the personnel of Levy in District Malakand after its merger under the Constitution (Twenty-fifth Amendment) Act, 2018. PW-4 also specifically verified that he conducted the search of the datsun pick up and seized the charas from its secret cavities underneath the driver's seat seizure fully verifying themselves as the personnel

11. Much of the same could be is worth seeing from the cross examination of PW4, the marginal witness of the recovery memo. Rather, PW5 confirmed that he was and other levy personnel were present on crime scene; spy information was received

during the patrolling duty; and more so, at 11.45 am, the appellant came to the crime scene while driving the datsun pick up from which the contraband charas was recovered.

12. Next, I shall come to the safe custody of the contraband charas and its safe transmission to the FSL. PW6 testified that he took the murasila along with the parcels containing the contraband charas to the Levy Post. PW4 deposed that he didn't send the case property to the Levy Post. This is obviously a contradiction. PW1 Muharrir Fazal Wahid deposed that he received murasila and the case property from PW6 (driver Hamid-ur-Rahman). According the Daily Diary # 11 of the arrival of Levy contingent in the Levy Post, PW4 took the appellant and the case property to the Levy Post and handed over both the appellant and the case property to the Muharrir. The latter then entered the case property in Register # 19, an extract of which was produced in the statement of PW1 as ExPW1/1. The aforesaid DD notes that the Levy contingent reached back to the Post at 2.20 pm. The murasila was prepared at 12.15 pm. PW4 reached back to the Post after 02 hours. As per the past practice in Malakand district, the complainant also conducted investigation. While leaving for patrolling duty, the

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complainant recorded his departure in DD # 6 which shows 9.00 am as the time of departure.

13. Constable Zahid Said (PW2) furnished evidence of the fact that he received the case property from the Muharrir on 23/08/2021, the next day of the occurrence, and took it to the FSL in Swat. He showed his *rahdari* receipt as Ex PW1/2. The FSL report shows: firstly, positive report of the samples as charas; and secondly, the belt # of PW 2 as 5851 and 23/08/2021 as the date of receipt of the samples. Thus, the safe as well as prompt transmission of the contraband charas was successfully proved.

14. Of no less importance is the testimony of one Ibrar Ali son Namir Khan, a resident of Manahkhel of village Ismaila of the Razar Tehsil in District Swabi, recorded as PW3. Ibrar Ali testified that he is the real owner of the datsun pick up which he had given to the appellant on 18/07/2021 on daily-wage-basis. He added that on eventful day, he came to know that the appellant was smuggling charas in the dastun pick up. He produced valid documents of his ownership to the Investigating Officer, recorded his statement before him and the Court of Judicial Magistrate. While under cross examination, he stated that before giving the vehicle to the appellant he had confirmed that the



appellant was not previously involved in such like cases.

15. The conclusion of the above discussion is that the prosecution has successfully proved the charge against the appellant. All the PWs furnished plain, positive and clear-cut evidence that the appellant was found driving the datsun pick up from which huge quantity of charas (6000 grams) was recovered. The recovery and chain of safe custody and transmission of the case property was fully proved. The FSL returned a positive report. Certain discrepancies were identified but those were minor in nature and worth ignoring in the circumstances of the case. It is pertinent to refer relevant case law.



16. In the case of **Faisal Shahzad vs. The State** reported as 2022 SCMR 905 [Supreme Court of Pakistan], it was held:

“All these witnesses have narrated the prosecution story in natural manner and remained consistent throughout and their testimony could not be shattered by the defence despite lengthy cross-examination. The said witnesses had no enmity with the petitioner to falsely implicate him in the present case.”

17. In **Liaquat Ali and another vs. The State** reported as 2022 SCMR 1097 [Supreme Court of Pakistan], the august Court observed:

"This Court in a number of judgments has held that testimony of police officials is as good as any other private witness unless it is proved that they have animus against the accused. However, no such thing could be brought on record by the petitioners in this case. This Court has time and again held that reluctance of general public to become witnesses in such like case has become judicially recognized fact and there is no way out to consider statement of official as good witnesses, as no legal bar or restriction has been imposed in such regard. Police officials are as good witnesses and could be relied upon, if their testimony remains un-shattered during cross-examination."

18. Similarly, in Rehmat Gul vs. The State 2022 P.Cr.L.J 10 [Peshawar], the honourable Court was of the view that:

"No doubt, the PWs are police officials but nothing in black & white is available on file to show their ill-will or enmity with the appellant to falsely implicate him in case."



19. Another relevant case is of Muhammad Faisal vs. The State reported as 2022 YLR 1163 [Sindh]. Its relevant paras read:

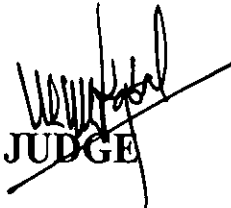
"13. [...]"

(a) That the arrest and recovery was made on the spot and the appellant was caught red handed with the narcotics by the police whose evidence fully corroborates each other in all material aspects as well as the prosecution case. It is well-settled by now that the evidence of a police witness is as reliable as any other witness provided that no enmity exists between them and the accused and in this case no enmity has been suggested against any of the police PW's and as such the police had no reason to falsely implicate the appellant in a false case. Thus we believe the police evidence which is corroborative in all material aspects. In this reliance is placed on Ijaz Ahmed v. The State (2009 SCMR 99). [...]"

(h) That although no Independent mashir was associated with the arrest and recovery of the appellant it has come in evidence that no private person was prepared to become an independent mushir at the time of arrest and recovery despite being asked. Even otherwise section 103, Cr.P.C. is excluded for offenses falling under the Control of Narcotics Substances Act, 1997 by virtue of section 25 of that Act. In this respect reliance is placed on the case of Muhammad Hanif v. The State (2003 SCMR 1237)."

20. In light of the above re-appraisal of the evidence of the prosecution and the legal principles laid down in the case law, I uphold the conviction and sentence passed by the learned Additional Sessions Judge/Judge Special Court/Izafi Zilla Qazi Malakand at Dargai, against the appellant. The instant appeal is, thus, dismissed.

Announced
Dt: 08.12.2022


JUDGE

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