

## **Judgment Sheet**

IN THE PESHAWAR HIGH COURT,  
PESHAWAR

**JUDICIAL DEPARTMENT**

**Cr.A No. 223-P of 2017.**

### **JUDGMENT**

Date of hearing.....27.09.2017.....

Appellant(s)...(Shan): By M/S Shabbir Hussain Gigyani and Farman  
Ullah Sailab, Advocates.

Respondent(s)/State: By Mr. Muhammad Riaz Khan Paindakhel,  
AAG.....



**QALANDAR ALI KHAN, J:-** This criminal appeal by Shan, appellant/accused, is directed against the judgment/order of the learned trial Court/Additional Sessions Judge-III/Judge Special Court, Peshawar, dated 06.04.2017, whereby, the appellant was convicted under section 9 (c) CNSA and sentenced to eight years R.I. and fine of Rs.50,000/- and in default thereof to further S.I for six months.

**2.** The impugned judgment, conviction and sentences emanated from case FIR No.1281 dated 17.09.2015 under section 9 (c) CNSA, registered in Police Station, Hayatabad, Peshawar, on the report of Akram Khan, complainant/ASI, who was present on routine patrol duty when received spy information about smuggling of heroin in Datsun bearing No.J-1107 from tribal territory, whereupon he laid a barricade and stopped the said Datsun. The driver of the Datsun disclosed his name as Shan son of Umar Gul resident of Afghanistan, presently residing in Shahkas, Jamrud; and search of the Datsun led to the recovery of ten packets of heroin, weighing ten kilograms, from a secret cavity on the driver side. The complainant/ASI separated 1/1 gram heroin from each of the ten packets as samples for chemical analysis in the FSL, and sealed the same in parcels, while separately sealed the remaining heroin; and took into possession the Datsun, and also arrested the appellant/accused; and sent the

*murasila* to Police Station Hayatabad, Peshawar, where case was registered, as mentioned hereinabove. The samples were received in the FSL on 28.09.2015, and chemical examiner furnished his positive report on 05.10.2015. After recording statements of PWs under Section 161 Cr.P.C and completion of investigation, complete challan was submitted against the appellant/accused to the learned trial Court/ASJ-III/Judge, Special Court, Peshawar.

**3.** The learned trial Court/ASJ-III, Peshawar, after compliance with the mandatory provision of Section 265-C Cr.P.C, framed formal charge against the accused/appellant, under Section 9 (c) CNSA, to which he pleaded not guilty and claimed trial. In order to prove its case against the accused facing trial/appellant, the prosecution produced six PWs, including Akram Khan(PW.1), complainant/ASI; (Muhammad Riaz Khan ASI (PW.2), witness who received the case property consisting of the remaining

quantity of heroin, samples and Datsun bearing No.J-1107; Khalid Khan SI (PW.3) registered FIR (EXPA) on the receipt of *murasila* in the P.S; Malik Habib Khan SHO (PW.4) submitted complete challan after completion of investigation; Anwar Ali OI (PW.5) conducted investigation in the case; and Sikandar Khan constable (PW.6), marginal witness to the recovery memo (EXPW1/1). After prosecution closed its evidence, statement of the accused was recorded under Section 342 Cr.P.C, wherein, he refuted allegations of the prosecution but declined to be examined on oath or produce defence. Thereafter, the learned trial Court ASJ.III/Judge, Special Court, Peshawar, heard arguments of learned APP on behalf of the State and learned counsel for the accused; and rendered the impugned judgment dated 06.04.2017, whereby, the accused/appellant was convicted under Section 9 (c) CNSA and awarded the sentences of imprisonment for eight years and

fine of Rs.50,000/-, or in default thereof, to six months S.I; which are impugned herein through the instant appeal.

4. Arguments of learned counsel for the appellant/accused and learned Additional AG heard; and record perused.

5. The case of the prosecution against the appellant/accused is that he was driving Datsun No.J-1107 at the relevant time when recovery of ten packets of heroin weighing ten kilograms was made from a secret cavity on the driver side; but statements of the PWs were not consistent on this point as Anwar Ali Oll (PW.5) stated that the secret cavity was prepared in the door of the driver side of the Datsun and Constable Sikandar Khan (PW.6) stated that the secret cavity was available on the right side of the driver; while the complainant/ASI (PW.1) contradicted them by saying that the secret cavity was made in the rear partition (portion) of the vehicle in question and that from the rear Partition (portion) he meant floor of the Datsun in

question. No doubt, police officers/officials are as good witnesses as any other witnesses; but their testimony need to be accepted with great care and caution, particularly, when there is prior information and the complainant/Police Officers have sufficient time to arrange presence of independent witnesses. In this case, the complainant/ASI, however, preferred to cite police officials, and his subordinates, as marginal witnesses to the recovery memo. In such a situation, the material contradictions with regard to the alleged recovery, pointed out above, would prove fatal for the case of prosecution. Besides, there is nothing on the record to prove that the appellant/accused was owner of the Datsun or that he was driver and driving the Datsun at the time of alleged recovery from the Datsun. It is an admitted fact that neither anything incriminating was recovered from the personal search of the appellant/accused by the complainant/ASI, nor there was any record of involvement of the

appellant/accused in such like case or in any other criminal activity in the past.

6. Moreover, the samples, reportedly, separated from the recovered heroin after the alleged recovery on 17.09.2015 were received for chemical analysis in the FSL after considerable delay of 11 days on 28.09.2015, without either any explanation for such an inordinate delay or evidence with regard to safe custody of the samples during the intervening period from the date of recovery up-to receipt of the samples in the FSL; rather evidence of the prosecution in this regard indicate total confusion, as according to the I.O (PW.5), he recorded statement of Muharrir of the P.S regarding sending the sample on 17.09.2015 and that the Muharrir told him that he had already sent the samples to FSL through Mustafa constable; but neither Mustafa Constable was mentioned as a PW in the challan form; nor, as such, produced as a PW in the Court. Even registers No.19 and 21 were not produced in the Court, and only

unattested photo copies of the said registers were produced, which could hardly prove safe custody of the samples while they were lying in the Police Station before their dispatch to the FSL so as to make report of the FSL credible and worthy of reliance.

7. Needless to say that in such like cases evidence pertaining to recovery, together with report of the FSL, form the two material pieces of evidence, and once they are declared not worthy of reliance, nothing is left to warrant conviction of an accused for a charge under CNSA. Keeping in view the foregoing discussion, the prosecution was unable to prove its case against the appellant/accused beyond any shadow of doubt, therefore, his conviction on the basis of material available before the learned trial Court would not be sustainable.

8. Consequently, the appeal is accepted, and the impugned judgment of the learned trial Court dated 06.04.2017, conviction of the



appellant/accused under Section 9 (c) CNSA and sentences of imprisonment for eight years and fine of Rs.50,000/- awarded to him by the learned trial Court are set aside. The appellant/accused is acquitted of the charges; and be set free forthwith, if not required in any other case.

Announced.  
27.09.2017.

**J U D G E**

**J U D G E**

*\*Ayub\**

*(D.B) Hon'ble Mr. Justice Lal Jan Khattak.  
Hon'ble Mr. Justice Qalandar Ali Khan.*