Judgment Sheet

IN THE PESHAWAR HIGH COURT, PESHAWAR

(Judicial Department)

Criminal Appeal No. 931-P/2021.

Suleman Vs The State.

JUDGMENT

Date of hearing. **18.02.2022.**

Appellant(s) by: **Ms. Farhana Naz Marwat Advocate.**

Respondent(s) by: **Ms. Abida Safdar AAG.**

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MUHAMMAD FAHEEM WALI, J:-Through instant criminal appeal filed under Section under Section 24 KP CNSA 2019, appellant Suleman has challenged the impugned judgment dated 06. 10.2021, rendered by learned Additional Sessions Judge-II/ JSC, Takht Bhai, Mardan; whereby appellant involved in case FIR No.624 dated 22. 08.2020, under Section 9-D KP CNSA 2019, Police Station Sher Garh, District Mardan, was convicted under Section 9-D KP CNSA 2019 and sentenced to undergo 10 years R.I alongwith fine of Rs.500,000/- or in default thereof to suffer further six(06) months SI; however, benefit of Section 382-B Cr.PC was extended to the appellant/ convict.

2. According to prosecution case, during checking, the Excise officials/personnel intercepted a Suzuki Motorcar bearing registration No.LOY-9868, driven by appellant; while co-accused Siyab was sitting on front seat of the said motorcar. On search, barring the driver gate, from inner side of rest of three gates, seven packets of Charas total weighing 7028 grams were recovered. From the personal search of appellant and co-accused Siyab, two mobile sets, their CNIC, one membership card of appellant and copy of registration card was recovered. The registration documents of the vehicle were also taken into custody by the Excise officials. The contraband alongwith motorcar and other personal belongings of accused etc were taken into custody by Excise personnel, both the accused were arrested and a case vide FIR mentioned above was registered against them.

3. After completion of investigation, complete challan against accused was submitted before the learned trial Court; where after framing of formal charge against the accused, the prosecution in order to prove its case against the accused, examined as many as seven(07) PWs. On closure of prosecution evidence, statements of accused under Section 342 Cr.PC was recorded; wherein they denied the allegations

levelled against them; however, they did not opt to be examined on oath under Section 340(2) Cr.PC nor wished to produce defence evidence. At conclusion of trial, the learned trial Court convicted and sentenced the appellant/accused; while co-accused Siyab was acquitted from the charges levelled against him vide impugned judgment; hence the instant criminal appeal.

4. We have heard learned counsel for the appellant, learned AAG for the State and gone through the available record.

5. As per contents of murasila Ex.PA/1, the Excise officials intercepted the vehicle in question, driven by appellant; while co-accused Siyab was sitting on front seat of the said vehicle; the search of which led to the recovery of Charas total weighing 7028 grams. However, neither in the Murasila nor in the FSL report, it has been mentioned that it was *Charas Pukhta or Charas Garda*. Likewise, the contents of murasila Ex.,PA/1 reveals that samples were separated from the recovered contraband and sealed into parcels for sending it to FSL but neither number nor name of monogram affixed thereon has been mentioned in the murasila. Though in recovery memo Ex.PW.1/3, the number of monogram has

been written as 3/3 monograms but instead of mentioning the name of monogram, only a rubber stamp has been affixed therein; which does not denote any monogram. Besides, registration documents of the motorcar have allegedly been recovered from the motorcar in question but it has not been clarified that from which place of the motorcar, it was recovered and; who was the owner of the vehicle as per the ibid registration documents. Even no driving license has been recovered from the direct possession of the appellant; so in absence of any driving license, it cannot be stated with certainty that who was on driving seat of the motorcar at the relevant time, so mere disclosing the appellant as driver of the vehicle is not sufficient qua corroboration of version of prosecution particularly when no recovery has been effected from the immediate possession of the appellant. Moreover, as per site plan, both the accused have been shown at points No.6 & 7 proceeding in motorcar from Mardan side; disclosing the presence of accused sitting behind each other; meaning thereby that one accused was sitting on front portion of the car while the other was sitting on rear seat of the vehicle; thereby, denying the version of prosecution qua

sitting of accused on driving seat as well as front seat of the motorcar.

6. In the instant case complainant/seizing officer Riaz Khan Inspector was examined as PW.1; while marginal witness namely Naeem Khattak ASI was examined as PW.2; but both these witnesses did not support each other on material points. According to PW.1, he was Incharge of the Check Post at relevant time; while PW.2, did not know that who was the Incharge of the checking staff at that time. PW.1 asserts that he opened the gates of the motorcar through screw driver brought by one Muhammad Ilyas constable from the official vehicle; whereas PW.2 denied his version by stating that at the time of checking the motorcar, the screw driver was in the hand of PW.1. PW.1, stated that after recovery of contraband, the gates of the motorcar were refitted by a constable in presence of marginal witnesses; while PW.2 asserts that it was not refitted in his presence. He was also unable to disclose the exact time of their arrival to the spot in his cross examination; rather stated that they follow the order of PW.1 and when and where he orders, they obey the same. According to PW.1, he weighed the contraband separately but as per PW.2, it was first weighed

separately and thereafter, the entire packets of narcotics were weighed. As per assertion of PW.1, the accused alongwith contraband and other documents were taken by Iftikhar Ajmal SI, Muhammad Ilyas and Attiqur Rehman constables in the motorcar of accused (case property) to the police Station; which deposition was belied by PW.2 by stating that official vehicle was taken alongwith motorcar of accused to the Police station. Likewise, PW.1 stated that they affixed lights in the trees near the check post and also kept a torch; in the light of which they alongwith I.O (PW.6) conducted the proceedings on the spot but as per PW.2, it was done in the light installed on the check post; however, PW.6 denied the assertions of both these witnesses by stating that in the lights of vehicles, the spot proceedings were conducted.

7. The alleged contraband has been recovered on 22.08.2020; while it was sent to the FSL on 24.08.2020 after delay of about two days; which fact is evident from the report of FSL as well as statement of concerned Moharrir and; the constable who took it to the FSL but the application of FSL does not bear any date of its drafting; while the relevant column qua date of its taking to the FSL, the name of the

official, who took it to the FSL and the receipt number on which it has been sent by the Excise officials, are blank. Even PW.2 Muhammad Qayum Khan OII(Investigation Officer) was unaware qua safe custody of the case property till sending to the FSL; who stated that he did not know that where the case property was kept till sending to the FSL. Moreover, none from the three officials who took the murasila alongwith case property and accused to the Police Station, has been examined by the prosecution during trial in support of its case in order to explain the handing over case property as well as its safe custody till the transmission to the FSL; for the reasons best known to them; which is clear violation of provision of Article 129-G of Qanun-e-Shahadat Order, 1984; as the prosecution had withheld its best evidence. Reliance be placed on case of ***"Muhammad Shah Khesro & another Vs The State & others" (2016 P.Cr.L.J 606),*** wherein this Court has held as under:-

> ***Article-129 (g)—Withholding of evidence—Presumption—If a best piece of evidence is available with a party and the same is withheld by him, then it is presumed that the party has some evil motive behind it in not producing that evidence."***

8. Apart from above, the delay of two days in sending the samples to the FSL has also not been plausibly explained by the prosecution; therefore, the evidence qua same transmission of alleged recovered narcotics to the laboratory for chemical analysis is missing. Chain of custody or safe custody and safe transmission of narcotic drug began with seizure of the narcotic drug by the law enforcement officer, followed by separation of the representative samples of the seized narcotic drug, storage of the representative samples and the narcotic drug with the law enforcement agency and then dispatch of the representative samples of the narcotic drugs to the office of the chemical examiner for examination and testing. Any break or gap in the chain of custody, i.e, in the safe custody or safe transmission of the narcotic drug or its representative samples made the report of the Chemical Examiner unsafe and unreliable for justifying conviction of the accused. Wisdom is derived from the judgments of august Supreme Court of Pakistan, reported in cases of ***"Qaiser Khan Vs The State" (2021 SCMR 363) and Mst. Sakina Ramzan Vs The State (2021 SCMR 451).***

9. Keeping in view the above, the prosecution had not been able to establish that after the alleged recovery the

substance so recovered was either kept in safe custody or that the sample taken from the recovered substance had safely been transmitted to the office of the Chemical Examiner without the same being tampered with or replaced while in transit; which creates doubt in the prosecution case, the benefit whereof go in favour of the accused. Likewise, numerous material contradictions between the statements of prosecution witnesses; create doubt qua mode and manner of recovery of contraband as well as presence of prosecution witnesses on the spot. Had they been present on the spot at the relevant time and recovered the contraband from the vehicle of accused in the mode and manner advanced by them; they would have supported each other on material points instead of contradicting each other. As per settled principles and guidelines provided by the Hon'ble august apex Court, in case of doubt, its benefit must go to the accused not as a matter of grace but of right. Such proposition has come up for consideration in the case of ***"Muhammad Akram v. The State" (2009 SCMR 230)***, wherein it has been held that:

> ***"It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as a***

> ***matter of right and not of grace."***

It was observed by the apex Court in the case of ***"Tariq Pervez v. The State" (1995 SCMR 1345)*** that:

> ***"for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right. Merely because the burden is on the accused to prove his innocence it does not absolve the prosecution from its duty to prove its case against the accused beyond any shadow of doubt and this duty does not change or vary in the case. A finding of guilt against an accused person cannot be based merely on the high probabilities that may be inferred from evidence in a given case. Mere conjectures and probabilities cannot take the place of proof."***

10. For what has been discussed above, we are of the firm view that the prosecution has miserably failed to prove its case against appellant beyond reasonable doubt to sustain conviction; as the evidence produced by prosecution during trial is full of contradictions and loop holes; creating doubt

qua mode and manner of recovery of contraband as well as presence of appellant on driving seat at relevant time; the benefit of which must be given to the accused. It is settled law that for giving/ extending benefit of doubt to an accused, it is not necessary that there should be many circumstances creating uncertainty. If a single circumstance created reasonable doubt in a prudent mind about the apprehension of guilt of an accused, then he/she shall be entitled to such benefit not as a matter of grace and concession, but as a right; while the instant case is full of doubts. Therefore, instant appeal is allowed, the impugned judgment dated 06. 10.2021, passed by learned trial Court qua conviction and sentence of appellant is set aside and; the appellant is acquitted of the charge levelled against him. He is in custody, be released forthwith if not required in any other case.

The above are reasons of our short order of even date.

Announced:
18.02.2022.

JUDGE

JUDGE

"A.Qayum PS" *(DB)* *Hon'ble Mr. Justice S M Attique Shah & Hon'ble Mr. Justice Muhammad Faheem Wali.*