

JUDGMENT SHEET

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

Cr.A No. 17-M/2020

*Murad Ali son of Mian Said (Appellant)
Versus*

*(1) The State through A.A.G.
(2) Umar Zada (ASI) Police Station Mingora.*

(Respondents)

Present: *Mr. Farooq Khan, Advocate.
Mr. Umar Sadiq, State counsel.*

Date of hearing: **07.10.2020**

JUDGMENT

WIQAR AHMAD, J.- Appellant is aggrieved of his conviction and sentence awarded vide order dated 05.12.2019 of the Court of learned Additional Sessions Judge-III/Judge Special Court Swat in case FIR No. 1462 dated 05.11.2018 registered under section 9 (b) CNSA at Police Station Mingora District Swat.

2. FIR in the case in hand was registered on the basis of 'Murasila' (Ex. PW-1/3), wherein it was narrated that the local police got information that appellant had been busy in selling narcotics. In pursuance to receipt of such information the local police went

to the spot on 05.11.2018, where they arrested the appellant at 16:45 hours. During his body search, the local police recovered 106 grams heroin from his side pocket. They separated one gram of heroin as representative sample, sealed it separately in parcel No. 1 for the purpose of chemical analysis in Forensic Science Laboratory (hereinafter referred to as "*FSL*"). 105 grams of heroin was separately sealed in parcel No. 2. Recovery memo Ex. PW-1/1 was also prepared separately. Card of arrest of appellant Ex. PW-1/2 was also issued. The allegedly recovered contraband was sent to FSL for the purpose of chemical analysis, report whereof was received, indicating that the representative sample was heroin.

3. On completion of investigation, complete *challan* was put in Court on 22.11.2018. Charge was framed against appellant on 21.01.2019. The accused did not plead guilty to the charge and claimed trial. During trial, an application was filed by the appellant for deciding the case on the basis of pleading his guilt. The learned trial Court accordingly

announced its order dated 05.12.2019 whereby the appellant was convicted for commission of an offence under section 9 (b) CNSA and was sentenced for four (04) days simple imprisonment. Feeling aggrieved from his conviction and sentence appellant has filed the instant criminal appeal.

4. Learned counsel for appellant stated that the stigma of conviction in a case under section 9 (b) CNSA, has been causing great hardships to the appellant. He further added that application had been obtained from the appellant by the Court staff, in absence of his counsel and he had been convicted on the application despite the fact that he had not pleaded guilty to the charge on 21.01.2019 and had been contesting the allegations leveled therein. He also added that a number of prosecution witnesses had already been examined and had the appellant been having the intention of pleading guilty, he would have done so at the start of trial.

5. Learned counsel appearing on behalf of State raised an objection towards maintainability of the instant appeal and stated

that an appeal against conviction based on pleading of guilty is not maintainable.

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

7. Perusal of record reveals that when charge was framed on 21.01.2019 the appellant did not plead guilty thereto. He had contested the allegations of the prosecution and had claimed innocence. Statements of four prosecution witnesses have been recorded on different dates thereafter. It was on 05.12.2019 that thumb impression of the appellant has been shown obtained on a preprinted form, wherein certain blank spaces have been filled with black ink. On the said date second charge was framed, and that also on preprinted form wherein blank spaces have just been filled with black ink. The appellant was shown to have pleaded his guilt to this charge by affixing his thumb impression. Statement of the appellant has also been shown recorded on a preprinted form in the above-mentioned manner, but strangely enough, it

indicates a date of 05.11.2019. Record in the trial had been transferred to the learned trial Court on 04.12.2019, wherein notice had been issued to appellant for the following date i.e. 05.12.2019. On said date all the above-mentioned proceedings have been shown conducted, but in absence of counsel for the appellant. Appellant had already engaged a counsel in the trial and was being represented through his counsel, but the day he has been shown to have pleaded his guilt, all the proceedings have been conducted in absence of his counsel. It is strange that the appellant had once been charge-sheeted, wherein he had pleaded innocence and claimed trial, then how was a second charge framed in the case? Such a procedure adopted by the learned trial Court in the case in hand, is totally alien to the law of criminal procedure governing the trial.

8. Section 265-D Cr.P.C provides that if the trial Court is of the opinion, after perusing the police report or the complaint, all other documents and statements filed by the prosecution, that there is ground for proceeding with the trial of the accused it shall frame a

charge against the accused in writing. Section 265- E (1) requires that charge so framed, shall be read and explained to the accused and he shall be asked whether he is guilty or has any defence to make. Sub-section (2) thereof provides that if the accused pleads guilty the Court shall record the plea, and may in its discretion convict him thereon. Section 265-F Cr.P.C provides that if the accused does not plead guilty or the Court in its discretion does not convict him on his plea, the Court shall proceed to hear the complaint and take all such evidence as may be produced in support of the prosecution.

9. Once charge was framed and the appellant did not plead guilty to it, prosecution was asked to lead its evidence wherein statements of four prosecution witnesses had also been recorded. There was no occasion for the trial Court to have framed a second charge, and that also in the manner as stated above. This Court in its earlier judgment in the case of "Habib-ur Rehman v/s The State" reported as 1997 P Cr. LJ 1930, while faced with a similar situation has held;

" The discretion in recording conviction on plea of guilty has also got nexus to the punishment. In case of a charge of carrying minor punishment the Court may on the plea of guilt by the accused convict him there and then but where the charge is of an offence carrying capital punishment of death or transportation of life, the Court is required to examine the prosecution evidence even if the guilt is admitted by the accused in response to a charge, as discussed in the case of Loung v. The State 1976 PCr.LJ 204. After complying with section 265-E, Cr.P.C., and when the accused did not plead guilty and claimed trial, there is no other way for the Court but to call for the prosecution evidence in support of the charge from the stage when the charge was charged and answered by the accused till the statement of the accused under section 342, Cr.P.C. and the conclusion of the prosecution evidence. There is no other stage or section of law enabling the Court to ask the accused of the charge levelled against him. After pleading not guilty the accused can only be allowed to accept the charge in his statement under section 342, Cr.P.C."


Conviction recorded in the instant case has not been made according to law, nor was the sentence justified on the basis of such a conviction.

10. So far as objection of the learned State counsel regarding maintainability of the instant appeal, is concerned, it has no doubt been provided under section 412 Cr.P.C that a conviction based on plea of guilt of an accused shall not be appealable and a limited window of appeal has only been provided therein. Said

provision of law being relevant is reproduced hereunder for ready reference;

S. 412. No appeal in certain cases when accused pleads guilty. Notwithstanding anything hereinbefore contained where an accused person has pleaded guilty and has been convicted by a High Court, a Court of Session or Magistrate of the first class on such plea, there shall be no appeal except as to the extent or legality of the sentence."

There is no doubt that an accused who plead guilty cannot appeal against his conviction, and he can only impugn the resultant sentence in its legality and magnitude. But the High Court, while dealing with such an appeal, may also look into legality of the conviction under the powers vested in it by section 439 Cr.P.C. Hon'ble Dhaka High Court in its judgment given in the case of "Loung v/s The State reported as 1976 P Cr.LJ 204 has held, in this respect, as follow;



"The discretion in recording conviction on plea of guilty has also got nexus to the punishment. In case of a charge of carrying minor punishment the Court may on the plea of guilt by the accused convict him there and then but where the charge is of an offence carrying capital punishment of death or transportation of life, the Court is required to examine the prosecution evidence even if the guilt is admitted by the accused in response to a charge, as discussed 'in the case of Loung v. The State 1976 PCr.LJ 204. After complying with section 265-E, Cr.P.C., and when the

accused did not plead guilty and claimed trial, there is no other way for the Court but to call for the prosecution evidence in support of the charge from the stage when the charge was charged and answered by the accused till the statement of the accused under section 342, Cr.P.C. and the conclusion of the prosecution evidence. There is no other stage or section of law enabling the Court to ask the accused of the charge levelled against him. After pleading not guilty the accused can only be allowed to accept the charge in his statement under section 342, Cr.P.C."

Further reliance may also be placed on judgment of the Hon'ble Baluchistan High Court in the case of "Nehal Khan v/s The State reported as 2003 P Cr. LJ 1278.

11. In light what has been discussed above, the instant appeal is allowed, conviction and sentence recorded vide impugned order dated 05.12.2019, framing of a second charge as well as the procedure adopted for recording statement of appellant dated 05.11.2019 are set aside. Learned trial Court shall conduct trial from the stage where it had been transferred to it on 04.12.2019 and shall proceed further according to law. The appellant is directed to appear before learned trial Court on 03.11.2020. Since the appellant has already been granted bail by learned trial Court during the

course of trial, therefore same concession shall be available to him subject to his furnishing bail bonds in the sum of Rs. 50,000/- with two sureties each in the like amount to the satisfaction of learned trial Court. Said bonds shall be submitted before the learned trial Court within a period of one week after receipt of judgment from this Court.

Announced
Dt. 07.10.2020


JUDGE


JUDGE

Office
17/10/2020
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