

JUDGMENT SHEET

**PESHAWAR HIGH COURT
MINGORA BENCH
(Judicial Department)**

Cr.A No. 322-M/2022

Javaid Khan son of Khan Amir.....(Appellant)

V/S

The State & another.....(Respondents)

Present: Mr. Sher Shah, Advocate, for the
accused/appellant.

Hafiz Ashfaq Ahmad, Asst:A.G, for the
State.

Date of hearing: 25.09.2023

JUDGMENT

SHAHID KHAN, J.- Through the subject criminal appeal, the appellant/accused, Javaid Khan, has called in question, the order/judgment of the learned Additional Sessions Judge, Model Criminal Trial Court, Malakand at Batkhela, whereby, on conclusion of trial, the learned trial Court convicted & sentenced the appellant/accused U/S 11 (b), Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019 and awarded him a sentence for rigorous imprisonment of 10 years with fine in the sum of Rs. 500,000/- (five hundred thousand), in default whereof, to suffer further six months SI. Benefit of section 382-B Cr. P.C. has also been extended to the accused/appellant.



2. Reportedly, the complainant/IHC, Ubaid Khan along with his official colleagues of levy force (named in the FIR) were present on crime scene and arranged an improvised "Nakabandi". At the fateful time, a motorcar bearing registration No. J-4876, driven by the accused/appellant (Javaid Khan), on its arrival at the *Nakabandi* point, it was signal to stop and its due search led to the recovery of narcotics as "ICE" net weighing 500 grams (lying in a plastic bag beneath the front seat of the car). The event was reduced into in writing in the shape of 'Murasila' (Ex. PA/1) followed by FIR No. 88 (Ex. PA) dated 14.10.2021 registered against the accused/ appellant, U/S 11 (b), K.P CNSA, Act, 2019 at P.S, *Fazal Subhan Shaheed (Thana)*, District Malakand.

3. Upon arrest of the accused/appellant followed by preliminary investigation on the spot, after drawl of sample from the relevant plastic bag, sealed the same in separate parcels as well as the remaining stuff and the 'Murasila' was sent to the P.S concerned.

4. On completion of the investigation, *challan* was drawn and was sent-up for trial to the learned trial Court. Accused was confronted with the statement of allegations through formal charge-sheet to which he pleaded not guilty and claimed trial.

5. To substantiate the guilt of the accused/appellant, the prosecution placed reliance on the account six (06) PWs. The accused was confronted with the evidence so furnished through statement of accused within the meaning of section 342 Cr.P.C.

6. On conclusion of proceedings in the trial, in view of the evidence so recorded and the assistance so rendered by the learned counsel for the accused/appellant and the learned State counsel, the learned trial Court arrived at the conclusion that the prosecution has successfully brought home charge against the appellant/accused, Javaid Khan, through cogent & worth reliable evidence, as such, the accused was convicted & sentenced (as highlighted in the proceeding Para of this judgment).

7. It obliged the appellant/accused to approach this Court through the subject criminal appeal.

8. Arguments of the learned counsel for the accused/appellant as well as the learned Astt: A.G for the State have been heard at a substantial length and the record gone through with their valuable assistance.

9. Needless to highlight that in the subject case, the law of the land was set in motion when the complainant/IHC, Ubaid Khan (PW-4), with other levy personnel laid a picket ("Nakabandi"). The levy officials halted a motorcar bearing registration No. J-4876 for the purpose of checking. Due search of the subject motorcar led to the recovery of narcotics as "ICE" net weighing 500 grams, lying in a plastic bag beneath the front seat of the car. Out of which, 5 grams was separated for the chemical analysis of the FSL and sealed in parcel No. 1, whereas, the remaining stuff i.e. 495 grams was sealed in parcel No. 2. The accused as well as the motorcar were taken into possession at the spot. The accused and the case property were handed over to PW-3, driver

Fazal Hussain (No. 5246) for its onward delivery to the police station concerned.

10. It is hard fact that in the subject event it was the complainant/IHC, Ubaid Khan (PW-4), who has conduct all the proceedings on the spot i.e. recovery of the contraband, separation of the sample, preparation of parcels, drafting of the '*Murasila*', recovery memo, arrest of the accused and sending the '*Murasila*' to the police station, however, it is interesting to note that even subsequently all the investigation has been carried & conducted by PW-4 himself. He handed over the '*Murasila*' to PW-3, Fazal Hussain, driver for its transmission to the police station for registration of the case, on his return he delivered the copy of the FIR for the purpose of further investigation to PW-4, Ubaid Khan. The complainant thereafter prepared the site plan, (Ex. PB) with all its put-notes on the pointation of the alleged eyewitnesses and recorded their statements U/S 161 Cr.P.C. The stuff sealed in a parcel, the motorcar and the

8/5/2

accused under the escort Duty-Police-Officer with his team were transmitted to the police station. The said PW produced the accused before the concerned Court for taking his judicial custody. He also drafted the application for sending the samples to the F.S.L with the directions to D.F.C Nafees Muhammad to take the same to the F.S.L and thus right from the very registration of the FIR till the completion of *challan* and submitting the same to the learned trial Court all the proceedings have been carried out by the seizing officer, Ubaid Khan, IHC (PW-4), therefore, in the given facts & circumstances, it is to be seen that as to whether the complainant/IHC under the law on subject was competent enough to carry & conduct the preliminary investigation on the spot or the Station Police Officer (SHO) of the P.S was authorized to depute a police officer competent under the law on subject to carry the investigation accordingly.



11. There is no denial at all that the complainant of a criminal case is always interested in success of his case which he has been registered against an accused person, as such, it cannot be denied that the complainant has every interest to bring home charge against an accused person in view of the evidence so collected during the investigation and on this score alone the seizure & arrest of an accused person has been allocated to the preventative police force, whereas, the investigation is carried & conducted by the Investigation Agency on the only ground to ensure free, fair & transparent investigation so that to avoid a remote chance biased attitude of the Investigation Officer to ensure by hook or crook the case as successful.



12. Other than it in the case in hand, the complainant/IHC, Ubaid Khan (PW-4) has acted as a complainant, as a witness as well as an Investigating Officer. Under the law a complainant

and an accused person are considered to be two opponents/rivals, as such, they are contesting parties, supporting their respective pleas/claims, whereas, the role of an Investigating Officer is to unearth the truth, an Investigating Officer cannot be expected to be a party in the case and that is what the relevant law on subject speaks. Rule No. 25.2 (3), Police Rules, 1934 as well as Article 18, Police Order, 2002 being relevant for the present controversy are reproduced below;-



25.2 (3) Within the limits of his charge he is the chief investigating officer, and as such he shall conduct all investigations in persons, so far as circumstances permit. His responsibility in this matter must be carefully maintained. Should it be necessary, owing to the absence of the sub-inspector or any other cause, for a subordinate to undertake an investigation, the sub-inspector shall satisfy himself by perusing the case diary and questioning the investigating officer that the investigation has been fully and properly conducted, shall remedy what is defective, and take over the investigation as soon as he is free to do so, except in a case originally investigated by an assistant sub-inspector where he will be guided by rule.

Article 18. Separation of investigation function.-

(1) There shall be separation of investigation from other functions of the Police.

(2) Subject to clause (3), the District Investigation Branch shall investigate, under the supervision of the Head of District Investigation Branch, all cases registered in the District.

(3) *The Provincial Police Officer may notify the offences which shall be investigated by the investigation officer in the police station under the supervision of the officer-in-charge of the police station and if an offence in a case is required to be investigated by the District Investigation Branch then the entire case shall be investigated by the District Investigation Branch.*

(4) *The District Investigation Branch, other than in the Capital City District or a City District, shall be headed by a police officer not below the rank of a Superintendent of Police and shall consist of such other police officers as the Provincial Police Officer may determine.*

The *ibid* rules mandates that an Investigating Officer is duty bound to dig-out the truth & actual facts of the case and he should not be guilty of a partisan approach. If the aforesaid yardstick is applied to the case of the accused/appellant then it is an admitted fact floating on the surface of the record that the complainant by acting as an Investigating Officer could not be expected fairness and transparency especially when the appellant in his statement recorded U/S 342 Cr.P.C has alleged a specific plea of *malafide* involvement of the levy officials, in particular the complainant of the subject event.

8/3

13. It is also relevant to mention here that in the recent past the trend of acting by the complainant as an Investigating Officer in narcotics cases have been deprecated & discouraged by this Court as well as by various Courts of the country and it was seriously observed that *"a complainant could not be an Investigating Officer, as such an act/practice goes a long way to defeat the very object of a fair, honest and transparent investigation"*. In case titled **"State through Advocate General, Sindh v/s Bashir and others"** reported as **PLD 1997 Supreme Court 408**, the Apex Court has held as under;-

The Investigating Officer is as important witness for the defence also and in case the head of the police party also becomes the Investigating Officer, he may not be able to discharge his duties as required of him under the Police Rules.

Likewise, in case titled **"Fahad v/s The State"** reported as **2022 P Cr.LJ 279**, the same rational was reiterated by the Sindh High Court in the following words;-

It is also pertinent to mention here that in this case complainant/ SIP Muhammad Khan had not only

lodged FIR but also conducted investigation of the case himself as well as he himself took the case property for Chemical Examination. In our view it is/was not appropriate that the person who is complainant of a case could investigate the same case and took the narcotic item for report because in order to keep all fairness of thing the rule of propriety demands that it must be investigated by an independent officer but not by the complainant himself.

Similarly, in case titled "Zeenat Ali v/s The State" reported as 2021 P Cr. LJ 1294 it was held by Islamabad High Court that;-

In the present case the complainant had himself conducted the investigation of the case, however, the person who was complainant of the case in order to keep all fairness of thing could not investigate the same case, which must be investigated by an independent officer but not by the complainant himself. Investigation by complainant while functioning as Investigating Officer is a biased investigation.

14. It is part of the record that in the subject case the investigation has been carried out by Ubaid Khan, IHC (PW-4), who is below the rank of Sub-Inspector. For ready reference Section 2 (e) (ii), K.P, CNSA Act, 2019 is reproduced below;-

(ii) a police officer/official not below the rank of Sub-Inspector, authorized by the Regional Officer;

However, in the case in hand, the aforesaid mandatory provision has not been complied with, therefore, on this alone, the impugned conviction & sentence is also not maintainable in the eyes of law.

15. It is well settled, it is not essential at all to place reliance on multiple doubts coupled with multiple grounds to extend the benefit of doubt to an accused, even a single worth reliable doubt is sufficient enough to extend its benefit to an accused person as it is the cardinal principle of criminal administration of justice that let hundred guilty persons be acquitted but one innocent person should not be convicted. In case titled "Tariq Pervaiz v/s The State" reported as 1995 SCMR 1345, the Apex Court has held as under;-

That the concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right.

Further reliance is placed on the case law cited as "Daniel boyd (Muslim name Saifullah) vs the State" reported as 1992 SCMR 196", where the following observations were recorded by the Apex Court;-

Nobody is to be punished unless proved guilty on the basis of reliable or true evidence. Benefit of every reasonable doubt is to go to the accused.

This view also reflects in the judgment of the apex Court titled as "Ghulam Qadir and 2 others vs the State" reported as 2008 SCMR 1221, wherein it was observed that:-

"Benefit of doubt. Principle of applicability. For the purpose of benefit of doubt to an accused, more than one infirmity is not required. Single infirmity creates reasonable doubt in the mind of a reasonable and prudent person regarding the truth of charge, makes the whole case doubtful. "

In support of the same rational, further reliance is placed on the judgment of the august Supreme Court of Pakistan cited as "Muhammad Zaman vs. the State" (2014 SCMR 749), wherein it was held that:-

Even a single doubt if found reasonable, was enough to warrant acquittal of the accused.

16. For what has been discussed above, this Court is of the firm view that the prosecution has failed to prove its case against the accused/ appellants, Javaid Khan beyond reasonable doubt, as such, his conviction cannot be maintained. Resultantly, while extending him the benefit of the doubt the subject criminal appeal is allowed and the impugned order/judgment of conviction

& sentence dated 21.09.2022 recorded by the learned trial Court is set aside and consequently the accused/appellant named above is acquitted of the charges leveled against him. He be released forthwith from the Jail, if not otherwise required.

17. These are reasons for my short order of even date.

Date of announcement
Dt: 25.09.2023


JUDGE

office
17/10/2023
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