

Judgment Sheet

PESHAWAR HIGH COURT, PESHAWAR.

(JUDICIAL DEPARTMENT)

Cr.A.No.1435-P/2019.**J U D G M E N T**

Date of hearing ----- 10.01.2023.

Appellant by --- M/s Abdul Latif Afridi, Noor Alam Khan
& Faqir Ullah Awan Advocates.State/ANF by --- Mr.Muhammad Waqas Khan Chamkani,
Special Prosecutor.

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S M ATTIQUE SHAH, J:- This criminal appeal is directed against the judgment dated 15.11.2019 of the learned Judge Special Court, Peshawar delivered in case FIR No.05 dated 14.05.2017 under sections 6, 9 (c), 14 & 15 of the Control of Narcotic Substances Act, 1997 registered at Police Station ANF, D.I.Khan whereby the appellant has been convicted and sentenced to imprisonment for life with a fine of Rs.200,000/- or in default whereof to further suffer simple imprisonment for one year, however, benefit of section 382-B Cr.P.C was extended to the appellant/convict.

2. As per prosecution case, on 14.05.2017, complainant Muhammad Asad

Abbas, SI, (P.W-2) along with other police contingent while present near CRBC Canal Indus Highway during *Nakabandi* received information qua smuggling of huge quantity of narcotics by drug peddlers Atta Ullah (appellant) and Abdur Rehman to Baluchistan through a white colour motorcar Toyota Corolla bearing registration No.ASH-175 whereupon the *Nakabandi* was further tightened. At about 0015 hours, the said motorcar came there, which was stopped and two persons found sitting in the vehicle were overpowered. On query driver of the motorcar disclosed his name as Atta Ullah (appellant) while the person sitting on the front seat disclosed his name as Abdur Rehman. On search, the complainant recovered 30 packets of *charas* from CNG Cylinder/Tank of the car. On weighment, the *charas* turned out to be of 32 Kgs. The seizing officer separated necessary samples from the recovered stuff for the purpose of chemical analysis while rest of the case property was sealed in a separate parcel. On the basis of *ibid* recovery, instant case was registered against the appellant.

3. After completion of investigation, complete challan against the appellant was submitted before the learned trial Court, which indicted the accused for the offence to which he pleaded not guilty. In order to prove its case, prosecution examined 04 witnesses, whereafter statement of the accused was recorded wherein he professed his innocence. After conclusion of the trial, the learned trial court while appreciating the evidence in its wisdom had found the appellant guilty of the charge and whilst recording his conviction sentenced him as mentioned above, whereagainst he has filed the instant appeal.

4. Heard. Record perused.

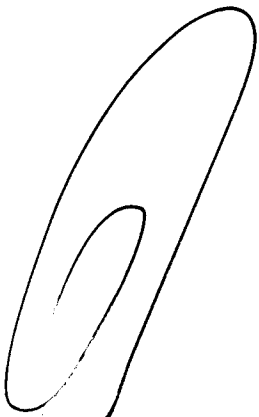
5. This being an appeal court is under legal obligation to re-assess and examine the evidence and material available on record of the case to arrive at a just conclusion regarding the conviction and sentence of the appellant and also to see whether the learned trial court has properly appreciated the evidence in its true perspective while convicting the appellant.

6. Case of the prosecution is that 32 Kg Charas was recovered from the CNG

Cylinder/Tank of the motorcar so concealed by the present appellant and; co-accused Abdul Rehman (proclaimed offender) therein.

7. The prosecution in support of its case has examined 04 P.Ws. P.W-2, SI Muhammad Asad Abbas complainant/ Seizing Officer of the case has stated that after cursory interrogation about the narcotics both the accused after some hesitation admitted/ disclosed the presence of narcotics secretly concealed in the CNG cylinder of the motorcar. *"After their disclosure I opened the CNG cylinder with the help of tools in the presence of witnesses and on the pointation of the accused and on checking the packets of narcotics were seen inside the CNG cylinder. After their disclosure on the spot, I prepared the pointation memo Ex.P.W 2/1 on the spot in the presence of witnesses and accused and also prepared the site plan Ex.P.W 2/2 as there was dark and due to security reasons, proceedings on the spot were difficult. So for the said reasons, the vehicle in question along with narcotics, both the accused and raiding party came to the police station and in the presence of witnesses and on the*

pointation of both the accused, the vehicle in question was thoroughly checked and inspected and the CNG tank was opened and I recovered 20 packets of charas duly wrapped with yellow solution tape". This P.W has not only in his examination-in-chief but also in his cross-examination admitted that the recovery memo Ex.P.W.2/3 was prepared in the police station, which clearly suggest that the recovery memo Ex.P.W.2/3 had not been prepared at the spot where the contraband was seized after cutting the CNG cylinder by the complainant with tools, which has created a serious doubt in the prosecution case as it is well settled that recovery memo must be prepared at the spot at the time of detecting and seizing the contraband. **Abdul Basit Vs. The State (2018 SCMR 1425)**. Indeed, it is not appealable to a prudent mind that the complainant along with the seizing party was present at the spot at 0015 hours, having information of alleged smuggling of the narcotics through motorcar but still failed to make necessary arrangements qua light and; proper security, which is beyond comprehension in view of peculiar facts and



circumstances of the case. This P.W has also stated that he had handed over the case property to the Moharrar, however, in the same breath he has admitted in his cross-examination that the extract of register-19 is not available on file. He has also admitted it correct that on judicial file he has not placed any document in support of safe custody of the case property. He has further admitted that the extract of *Raseed-e-Rahdari* is also not available on judicial file.

8. P.W-3, CT Muhammad Bilal Afzal has also stated that after the disclosure of the narcotics by the accused the complainant/I.O opened the CNG cylinder with the help of tools in his presence and on pointation of the accused and upon checking the CNG Cylinder narcotics packed in plackets were seen inside the said cylinder. He also admitted that the complainant/I.O has prepared the pointation memo Ex.P.W.2/1 and site plan Ex.P.W.2/2 on the spot in presence of the witnesses. The testimony of this P.W also suggests that no recovery memo was prepared at the spot by the complainant/I.O despite opening of the CNG cylinder/tank with the help of tools,

which is indeed serious lapse on the part of the seizing officer. Record further suggests that the occurrence had shown taken place at 0015 hours whereas the FIR was lodged in the police station by the complainant at 300 hours and the record is silent in respect of the safe custody of the recovered contraband right from 00:15 to 300 hours.

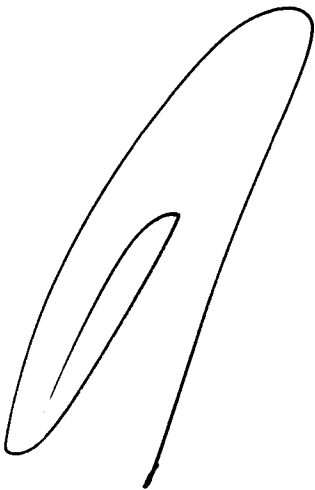
9. P.W-1 is the Moharrar who has stated that the representative samples were handed over to him by P.W-2 complainant which were entered in register No.19 and was deposited in the *Malkhana*, however, in his cross-examination he admitted it correct that extract of register No.19 is not available on the judicial file. He has further stated that *"I do not remember the serial number of entry made in register No.19 regarding the case property"*. He has also stated that he has sent the representative samples to the FSL, however, he has candidly admitted in his cross-examination that extract of *Raseed-e-Rahdari* is not available on judicial file.

10. As of now, it is well settled that in the case of narcotics, prosecution is under bounden duty to establish its case through an unbroken chain qua safe transmission of

the recovered contraband and; samples from spot to PS for its safe custody in *Malkhana* and; onward transmission of said samples to the FSL for its chemical examination and; any break in the said chain would materially affect the case of prosecution qua safe custody and transmission to the FSL. ***Mst.Sakina Ramzan Vs. The State (2021 SCMR 451), Qaiser Javed Khan Vs. The State (PLD 2020 SC 57) and Amjad Ali Vs. The State (2012 SCMR 577).*** No doubt P.W-1 (Moharrar) has stated that he had received representative samples from P.W-2, however, prosecution could not prove such stance of P.W-1 as the extract of register Nos.19 & 21 could neither be placed on record of the case nor could so produced before the learned trial court by the prosecution. Besides, no justifiable reason or explanation could be forwarded qua its non-production before the court by the prosecution. The production of register Nos.19 & 21 along with *Rahdari* receipts was imperative for the prosecution being an important piece of evidence qua safe custody and transmission of the representative samples for its chemical examination to the

FSL and; indeed its non-production before the learned trial court has created serious dent in the case of prosecution. **Zubair Khan Vs. The State (2021 SCMR 492)**. Mere entering into witness box by the P.W and stating that he has received the representative samples is not sufficient for maintaining the conviction under capital charge when important piece of evidence was withheld by the prosecution.

11. No doubt a huge quantity of narcotics has been shown recovered from motorcar, however, mere recovery of huge quantity is not sufficient for maintaining conviction under capital charge unless and; until the same is established beyond a reasonable doubt through cogent evidence. Indeed it is not necessary that there should be many circumstances creating doubts in the case of prosecution, rather a single circumstance creating reasonable doubt in a prudent mind about guilt of an accused makes him entitle to its benefit not as a matter of grace or concession but as a right. **Khalid Mehmood Vs. The State (2011 SCMR 664)**, **Tahir Khan Vs. The State**



(2011 SCMR 646) and Muhammad Islam Vs. The State (2011 SCMR 820).

12. It is settled that conviction under capital charge can only be maintained when prosecution is able to produce before the court evidence of unimpeachable character, which is certainly not the case here.

13. Coming to the contention of learned Special Prosecutor for ANF that the learned defence counsel had admitted and confirmed the chain of events from the mouth of P.Ws while cross-examining them. Suffice it to say that it is long been settled that in a criminal case an accused is not bound by the admissions made by his counsel while cross-examining the P.Ws. **Abdul Khaliq Vs. The State (1996 SCMR 1553).** Therefore, prosecution cannot get any benefit and premium from the alleged admissions/conformations.

14. Upon reappraisal of the evidence and material available on record of the case we are of the view that the learned trial court has not properly appreciated the evidence and material available on record of the case while rendering the impugned findings of

conviction and sentence of the accused-appellant.

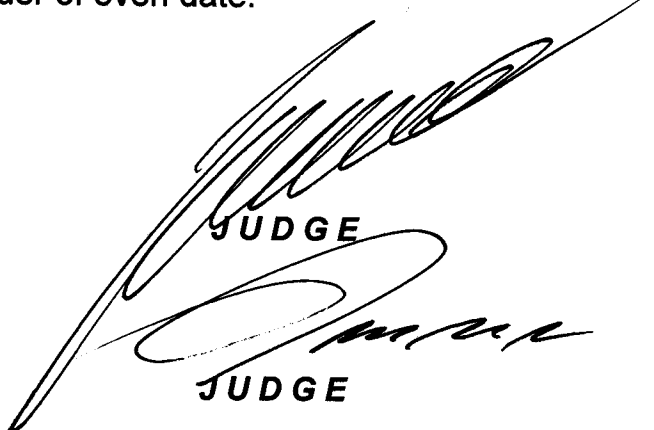

15. In view thereof, the instant appeal is allowed, the impugned judgment of the learned trial Court dated 15.11.2019 is set aside and; appellant Atta Ullah is acquitted of the charge leveled against him. He is in custody, be released forthwith if not otherwise required or wanted in any other criminal case.

16. Above are the detailed reasons for our earlier short order of even date.

Announced.
Dt. 10/01/2023.

HON'BLE MR.JUSTICE ISHTIAQ IBRAHIM &
HON'BLE MR.JUSTICE S M ATTIQUE SHAH

(A-K-KHAN Court Secretary)


JUDGE

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