JUDGMENT SHEET
PESHAWAR HIGH COURT, PESHAWAR
JUDICIAL DEPARTMENT

Cr.M. (BA) No.1263-P/2023

Zia-ur-Rehman

Vs.

The State

Date of hearing **17.04.2023**

Petitioner(s) by: **Mr. Noor Alam Khan, Advocate.**

State by: **Mr. Kamran Murtaza, AAG.**

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JUDGMENT

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IJAZ ANWAR, J. Through instant bail application, accused petitioner Zia-ur-Rehman son of Latif Khan seeks his release on bail in case FIR No. 33 dated 11.02.2023 under section 11-C KPCNSA, 2019 registered at Police Station Landi Kotal, District Khyber.

2. In the instant case, accused petitioner is charged for recovery of 06 packets ICE, each weighing 500/- grams total 3000 gram lying in vehicle “Fielder” bearing registration No. SR 55 being driven by him.

3. Learned counsel for the petitioner argued that in the instant case, arrest and seizure of the alleged contraband was effected by an Assistant Sub-Inspector. According to him, the said official is not authorized officer within the meaning of Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019 (hereinafter to be referred as “the Act”) as defined in Section 2(e) of “the Act” and as such, the arrest and seizure, so

made, is against the law. He further contended that the accused, in his statement under Section 161 Cr.P.C, has given another version of the occurrence, as such, this case has become one of further inquiry. He placed reliance on the case titled **"Raza and another Vs. The State (PLD 2020 SC 523)"** and a recent judgment of the apex Court passed in Criminal Petition No.885 of 2022 decided on 23.08.2022, whereby, bail was granted to an accused on the only ground that in terms of Section 2(c) of "the Act", only Sub-Inspector is authorized to search/stop, inspect any vehicle or seize the narcotics. He also referred to an interim order of the apex Court granting ad-interim pre-arrest bail in Criminal Petition No.09-P of 2023 on 20.02.2023.

4. On the other hand, the learned AAG, representing the State, argued that it is not mandatory that only officer not below the rank of Sub-Inspector can effect search, seizure and arrest, without warrant. He relied upon an order of this Court passed in Cr.M. (BA) No.1540-P/2020 decided on 29.06.2020, wherein, such issue is elaborately dealt with.

5. Arguments heard and record perused.

6. It is pertinent to mention here that this controversy also remained a contesting issue before the superior Courts after the promulgation of the Control of Narcotic Substances Act, 1997 (hereinafter to be referred as "the Act of 1997"), because, in "the Act of 1997", an officer,

not below the rank of Sub-Inspector, was authorized to make search, seizure or arrest etc.

7. This issue has recently been decided by a Single Bench of this Court in Cr.M. (BA) No.1540-P/2020 decided on 29.06.2020 through an elaborate judgment. The purpose of referring to the said judgment is that in the said case, almost the entire relevant case law of the Hon'ble Supreme Court of Pakistan was referred and relied upon. Para-6 to 9 of the judgment dated 29.06.2020, being relevant, are reproduced as under:-

> **"6.** The Control of Narcotic Substances Act, 1997 (Act XXV of 1997) ***(to be referred hereinafter as the Act of 1997),*** was enacted and promulgated in the year 1997, and made applicable throughout the Pakistan. The Government of Khyber Pakhtunkhwa in the year 2019, enacted and promulgated the Khyber Pakhtunkhwa Control of Narcotics Substances Act 2019 (Act No.XXXI of 2019), vide notification dated 4th September, 2019, extendable to the whole of the Province of the Khyber Pakhtunkhwa, and under section 59 thereof, the Act of 1997 was repealed but only to the extent of cultivation, possession, selling, purchasing, delivery and transportation etc within the Province to the extent of the Khyber Pakhtunkhwa. For the sake of convenience and ready reference section 59 of the Act of 2019, is reproduced below:-
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> > **"59. Repeal and Savings:- (1)** The Control of Narcotics Substances Act, 1997 (Act No.XXV of 1997), to the extent of cultivation, possession, selling, purchasing delivery and transportation etc within the Province, to the extent of the Khyber Pakhtunkhwa is hereby repealed."
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> **7.** The thread bare reading of section 59 of the Act of 2019 depicts that though the Act of 1997 has been repealed but only to the extent of cultivation, possession, selling, purchasing, delivery and transportation etc, within the province of the Khyber Pakhtunkhwa, however, it does not speaks specifically about repealing of rest of the provisions of the Act of 1997.
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> **8.** Perusal of both the enactments would reveal that section 21 of the Act of 1997, is analogous to a great extent with section 28 of the Act of 2019, as both speak about the power of entry, search, seizure and arrest of accused without warrant. For the sake of convenience and

ready reference, section 21 of the Act of 1997 is reproduced below:-

> **21. Power of entry, search, seizure and arrest without warrant. – (1)** Where **an officer, not below the rank of Sub-Inspector of Police or equivalent authorized in this behalf by the Federal Government or the Provincial Government**, who from his personal knowledge or from information given to him by any person is of opinion that any narcotic drug, psychotropic substance or controlled substance in respect of which an offence punishable under this Act has been committed is kept or concealed in any building, place, premises or conveyance, and a warrant for arrest or search cannot be obtained against such, person without affording him an opportunity for the concealment of evidence or facility for his escape; such officer may:-
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> (a) enter into any such building, place, premises or conveyance;
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> (b) break open any door and remove any other. obstacle to such entry in case of resistance;
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> (c) seize such narcotic drugs, psychotropic substances and controlled substances and other materials used in the manufacture thereof and any other article which he has reason to believe to be liable to confiscation-n under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act; and
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> d) detain, search and, if he thinks proper, arrest any person whom he has reason to believe to have committed an offence punishable. under this Act.
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> (2) Before or immediately after taking any action under sub-section (1), the officer referred to in that sub-section shall record the grounds and basis of his information and proposed action and forthwith send a copy thereof, to his immediate superior officer. (**Bold and underline supplied emphasis).**

I deem it appropriate to reproduce section 28 of the Act of 2019, for facility reference and comparison with section 21 of the Act of 1997, which read as under:-

> **28. Power of entry, search, seizure and arrest without warrant.---(1)** Where an **authorized office**r, who from his personal knowledge or from information given to him by any person, is of the opinion that any narcotic substance is kept or concealed in any building, place, premises, dwelling house or conveyance and warrant for the search or arrest cannot be obtained from the Special Court against such person without affording him an opportunity for the

concealment of evidence or facility for his escape, such officer may-

(a) enter into any such building, place, premises, dwelling house subject to the proviso of sub-section (1) of Section 27 of this Act;

(b) break open any door and remove any other obstacle to such entry in case of resistance;

(c) seize such narcotic substances, methamphetamine and other materials used in the manufacturing thereof and any other article or documents which he has reason to believe to be liable for confiscation or may furnish evidence of the 4 commission of an offence punishable under this Act; and

(d) search and, if he thinks proper, arrest any person whom he has reason to believe to have committed an offence punishable under this Act.

(2) Before or immediately after taking any action under sub-section (1), the authorized officer, mentioned in sub-section (1), shall record the grounds and basis of his information and take immediate necessary action and forthwith send a copy of the same to the Director or as the case may be to the Regional Police Officer".

The word **"Authorized Officer"** has been defined under section 2(e) of the Act of 2019, which means:-

(i) An Officer of the Directorate General, not below the rank of Sub-Inspector, authorized by the Director; or

(ii) A Police Officer/official not below the rank of Sub-Inspector, authorized by the Regional Police Officer.

9. Section 21 of the Act of 1997 *(almost ditto copy of section 28 of the Act of 2019),* has remained the point of discussion before the august Supreme Court of Pakistan in different cases. Useful reference can be made to case titled, **"Muhammad Younas and others vs Mst. Perveen alias Mano and others" (2007 SCMR 393),** wherein the august Supreme Court was pleased to hold that arrest of accused in possession of narcotics by a Police Officer below the rank of Sub-Inspector would not vitiate the prosecution case, rather the competent Court would proceed to determine the guilt or innocence of the accused on the basis of evidence, irrespective of the manner in which he is brought before the court. The relevant portion of the judgment (supra) is reproduced below:-

"The other argument of the learned counsel for the respondent No.1 as to the violation of the

provision of section 21 and 22 of the Act needs to be dealt with. **Ordinarily, only an officer of the rank of Sub-Inspector or equivalent or above may exercise the powers of arrest and seizure of narcotics. But this is not an absolute rule. There may be cases of extreme urgency requiring prompt action, where an accused is caught with narcotics in his possession by a Police Officer of a lower rank. Can it be said that such Police Officer should just let him go with the narcotics? The answer would certainly be in the emphatic "No".** The guilt or innocence of an accused does not depend on the question of competence or otherwise of a Police Officer to investigate the offence. A trial of an accused is not vitiated mere on the ground that the case has been investigated by an officer who is not authorized to do so unless a contrary intention appears from the language of a statute. The competent Court would proceed to determine the guilt or innocence of an accused on the basis of the evidence produced before it irrespective of the manner in which he is brought before it. A somewhat similar view was taken in the cases of "Mr. Abdul Latif Vs GM Paracha and others" (1981 SCMR 1101), "State through Advocate General Sindh Vs Bashir and others" (PLD 1997 SC 408), "The Crown vs Mehar Ali" (PLD 1956 FC 106), " M.S.K Ibrat Vs the Commander in chief, Royal Pakistan Navy and others" (PLD 1956 SC 264), "Ahmad Khan Vs Rasul Shah and others" (PLD 1975 SC 66 at page 81, 88and 151-152), "Muhammad and others Vs the State" (1984 SCMR 954) and "the State vs Sohail Ahmed and 04 others" (PLD 1990 FSC 29). We may however observe that in a proper case, a Police Officer, if guilty of deliberate usurpation of power and violation of a statute may render himself liable to disciplinary or penal action or both in accordance with law. The purpose of enacting protective provisions of sections 21 and 22 of the Act seems to be that normally the cases of narcotics being of serious nature should be handled by more responsible Police Officer. (**emphasis supplied).**

In case titled, "**The State vs Abdali Shah", (2009 SCMR 291),** it has been held by the Hon'ble Supreme Court that:-

"**Even the provisions of sections 20 to 22 of CNSA being directory, non-compliance thereof would not be a ground for holding the trial/conviction bad in the eyes of law. On this ground the conviction of the appellant cannot be set aside.** Reference in this behalf

> can be made to the case of Fida Jan v the State 2001 SCMR 36; State through AG Sindh v Hemjoo 2003 SCMR 881, Karl Johan Joseph v the State PLD 2004 SC 394 and Muhammad Younas v Mst. Perveen alias Mano and others 2007 SCMR 393, wherein it is observed that where provisions of CNSA are directory in nature, non-compliance of the same is not fatal". **(emphasis supplied).**

Similarly, while dilating upon the provision of section 21 of the Act of 1997, the Hon'ble Supreme Court in case titled, **"The State Vs Abdali Shah" (2009 SCMR 291),** made the following observations:-

> "It would be seen that a huge quantity of 52 Kgs of chars was allegedly recovered from the Taxi beside which the respondent was standing while closing its dickey. It is not possible that the police would foist such a huge quantity of charas upon him**. It appears that the learned High Court has relied heavily upon the technical aspect of the seizure and arrest which in our opinion are misconceived as in the fist place no raid was carried out by the police personnel but the respondent apprehended during normal patrol duty. As such the provisions of section 21 are not applicable. Even otherwise, it cannot be expected that upon apprehension of the accused the police party would go in search of the officer who is entitled to arrest the accused being an ASI. At the most, this was an irregularity which was curable under section 537 Cr.P.C. as held by this Court in case of Muhammad Hanif (supra).** (emphasis supplied)".

8. Recently too, a two members Bench of the Hon'ble Supreme Court of Pakistan in the case titled **"Syed Zulfiqar Shah Vs. The State through Advocate General, Khyber Pakhtunkhwa Peshawar (2022 SCMR 1450)/(C.P. No.518 of 2022 decided on 07.06.2022)"**, while considering the effect of Section 27 of "the Act", held that "the relevant provisions are not mandatory in nature so as to vitiate the whole proceedings" and thus, declined the relief of bail.

9. In the case titled "**Fida Jan Vs. The State (2001 SCMR 36)",** a three members bench of the Hon'ble Supreme Court of Pakistan held that "the provisions of Section 20 of the CNSA of 1997 are directory in nature, and conducting the raid, without obtaining a search warrant, would not in itself suffice to vitiate the trial. The apex Court further held:-

> ***"6. We have considered the implication of section 20 of the Act. It appears that the law givers have coached this section of law in such manner that it does not place a mandatory obligation upon the Investigating Agency to obtain search warrants from the Special Judge before conducting a raid….[From the language employed in a statute it can be gathered whether it is mandatory or directory in its nature. We have noticed that in section 20 of the Act word "may" has been used with reference to obtaining search warrants by the agency who intended to effect search of a house, place, premises or conveyance etc. It is also known principle of interpretation of statute that word "may" sometimes can be used as "shall". But perusal of section 20 of the Act suggests that law has not prescribed consequences of conducted search without obtaining the warrants from Special Court. Thus, we are of the opinion that it is directory in nature, therefore, depending upon facts and circumstances of each case if the Investigating Agency has not obtained search warrants from Special Judge before conducting raid in a house for the recovery of narcotics, this reason alone would not be sufficient, to vitiate the trial".***

Similarly, a three-member Bench of the apex Court in the case titled **"The State Vs. Hemjoo (2003 SCMR 881)"** held that non-compliance of the provisions of Section 20 of the CNSA of 1997 cannot be a norm, rather it may be condoned,

only in some exceptional circumstances, justifying such non-adherence. The apex Court held:-

> ***"The combined study of sections 20 and 21 of the Control of Narcotic Substances Act, 1997 would show that only in exceptional cases in which the search warrant cannot possibly be obtained before conducting the raid, an officer authorized in this behalf can proceed for conduct of raid without the warrant but this power cannot be allowed to be used in every case in the normal circumstances".***

A similar view was also expressed in the case titled "**Arshad Mahmood Vs. The State (PLD 2008 SC 376)".**

Similarly, a larger bench of the Hon'ble Supreme Court of Pakistan in the case titled **"Zafar Vs. The State (2008 SCMR 1254)"** approvingly referred to the cases of Fida Jan and Muhammad Younas for making the observations that the provisions of Sections 20 to 22 of the CNSA of 1997 are directory, and that neither can the non-compliance of the said provisions be a ground for holding the trial or the conviction awarded to an accused bad in the eyes of law nor can the conviction be set aside on this ground. The provisions of section 20 & 22 of the CNSA, 1997 are pari materia to section 27 & 29 of the CNSA, 2019 regarding which the apex Court has already held it as directory and not mandatory.

10. In all the above referred judgments, I find that the determination pertaining to the above relevant provisions of law has already been made by the Larger Benches of the Hon'ble Supreme Court of Pakistan and have decided this issue conclusively. This Court, in view of the reported cases

titled **“Qaiser and another Vs. The State (2022 SCMR 1641), Hasnain Raza and another Vs. Lahore High Court, Lahore and others (PLD 2022 SC 07) and Messrs Cherat Cement Co. Ltd. Nowshera and others Vs. Federation of Pakistan and others (PLD 2021 SC 327)”,** is thus bound by the judgments of the Larger Benches of the apex Court.

11. I am, thus, clear in my mind that power to entry, search, seizure and arrest without warrant by an officer below the rank of Sub-Inspector if made would not vitiate the case nor it can be made a ground for the grant of bail.

12. Now coming to the merits of the case. Perusal of record would show that the accused petitioner has been arrested red handed and recovery of huge quantity of ICE has been effected from the vehicle being driven by him who, at the relevant time was present all alone in the vehicle. Thus he cannot dispute his conscious knowledge regarding concealment/presence of the narcotic substance in the vehicle. Copy of the relevant page of register No. 19 is available on record verifying safe custody of the case property/samples. In order to confirm the nature/type of psychotropic substance, samples were separated from all the packets and sent to the FSL for chemical analysis. The FSL has furnished its positive report confirming the samples to be “Methamphetamine”. No malafide, ill will or grudge has been shown against the police for falsely involving the petitioner in the instant case nor is it

possible for the police to plant such a huge quantity of ICE which is, by far the most expensive drug.

13. Thus the data available on record prima facie connects the accused petitioner with the commission of the offence punishment whereof falls within the prohibitory clause of section 497 Cr.P.C disentitling him to the concession of bail. Resultantly, this bail application is dismissed.

Announced
Dt:17.04.2023

JUDGE

(SB) Hon'ble Mr. Justice Ijaz Anwar

Muhammadullah