

Judgment Sheet
PESHAWAR HIGH COURT, PESHAWAR
(Judicial Department)

I.Cr.A No. 1558-P/2019

Niaz Ahmad..Vs..The State

JUDGMENT

Date of hearing : 24.9.2020
Appellant by : Mr. Ali Gohar Durrani. Advocate
Respondent by : Mr. Arshad Ahmad. AAG

S M ATTIQUE SHAH. I. This appeal under S. 410 Cr.PC read with S. 48 of CNSA, 1997 has been preferred by the appellant, Niaz Ahmad, against the judgment dated 18.11.2019 passed by the learned Additional Sessions Judge-II/Judge, Model Criminal Trial Court, Kohat, whereby, the appellant has been convicted and sentenced in case FIR No.388 dated 21.12.2016 under S. 9-C CNSA registered at Police Station Jarma, District Kohat to imprisonment for life and; also sentenced to pay a fine of Rs.3,00,000/- and in default, to serve six months Simple Imprisonment; benefit of S. 382-B Cr.PC was extended to the convict/appellant.

2. Precise but relevant facts leading to the present case are that, on 21.12.2016, complainant Gul Janan, Inspector upon spy information of trafficking huge quantity of narcotic in a Flying Coach No.MII-4065, via Indus Highway laid picket alongwith other police officials

at Muslim Abad Check Post; in the meantime, the said Flying Coach being driven by Naqeeb-ur-Rahman in company of Niaz Ahmad coming from Kohat side was intercepted. The complainant noted double floor in the vehicle, hence, he opened the floor with tools and from secret cavity recovered 74 packets Chars Garda, total weighing 74 Kilograms. The complainant separated 05/05 grams from each packet as sample for FSL analysis, packed & sealed the same in parcel No.1 to 74 while the remaining contraband was packed & sealed in another parcel No.75, whereafter, murasila (Ex.PW.2/2) was sent to Police Station and instant case was registered vide FIR (Ex.PA).

3. On completion of investigation, complete challan was submitted before the court. Since, co-accused Naqeeb-ur-Rahman was released on bail but subsequently, was arrested in another criminal case and was confined at District Jail, Mianwali (Punjab), therefore, his case was separated under S. 540-A (2) Cr.PC. Charge against the accused/appellant was framed to which he pleaded not guilty and claimed trial.

4. In order to prove and bring home the charges leveled against him, the prosecution produced and examined as many as nine (09) PWs. After closure of prosecution evidence, statement of the accused was

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recorded u/s 342 Cr.PC, wherein, he negated the charges leveled against him and posed innocence.

5. Arguments of learned counsel for the accused-appellant and learned AAG on behalf of the State heard and record with their valuable assistance gone through.

6. The case of prosecution against the convict/appellant is that, on 21.12.2016, the complainant got spy information regarding trafficking of huge quantity of narcotic via Flying Coach No.4065-MII, upon which he alongwith other police contingent laid picket at Muslim Abad Check Post and; when found the said Flying Coach coming towards Kohat was stopped for the purpose of checking. Naqeeb-ur-Rahman, was driving the said vehicle whereas convict/appellant was sitting in front seat. During search of the vehicle in question, the complainant noted that there was double floor beneath the seats thus, he opened the rear bumper beneath the grill with the help of tools and found double floor having secret cavity, in which 74 packets of Chars Garda were lying. The contraband was taken out and weighed with digital scale; each packet was containing 1/1 kilogram Chars Garda, as such, total Chars Garda was came out to be 74 Kilograms. The complainant separated 5/5 grams Chars Garda from each packet as sample for FSL analysis and sealed the same in Parcel No.1 to 74 whereas the

remaining quantity was sealed in Parcel No.75. The complainant affixed 3/3 seals of monogram SM over the parcels, however, the said monogram does not signify the name of the seizing officer PW-2 namely Gul Janan Khan Inspector. No explanation was offered as to why the said parcels did not contain the monogram of seizing officer, as such, has created a serious doubt regarding the seizer of contraband. **2015 SCMR 291 Akhtar Iqbal V. The State.**

7. The complainant has alleged that he had used tools for opening the secret cavity of the vehicle but, he has neither specifically mentioned in the murasila nor stated in his examination in chief that what kinds of tools he had used and from where he had arranged that tools. The fact of using tools by the complainant has remained unspecified during the course of investigation.

8. After conducting the alleged recovery proceedings, the complainant sent murasila to PS for registration of case through Faisal Manan, Constable, which was being received by Khaliq Nawaz, Moharrar, who appeared before the Court and examined as PW.1 and; stated that on receipt of murasila, he registered the case vide FIR Ex.PA. In cross-examination, he stated that; *"I only received murasila"* albeit, he has been contradicted by Gul Rahman SI (Rtd), PW.6 who stated in his cross-

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examination that *"I received a card of arrest, recovery memo, murasila and FIR before proceeding to the spot. The said documents were handed over to me in the PS. I left the PS at 20:40 hours.* If only murasila was brought to Police Station by Faisal Manan, Constable then after registration of case, how recovery memo, card of arrest were handed over to the I.O of the case in the PS, is a question, which makes the preparation of above said documents by the complainant highly doubtful.

9. In a case of narcotic, the recovery of contraband, its safe transmission to the PS for safe custody and; onward transmission of samples to the Government Analysts for its chemical examination is of vital significance. In the case in hand, recovery of contraband was allegedly effected on 21.12.2016; but, the sample separated therefrom were sent to FSL on 03.01.2017 with an unexplained delay of about 13 days, which was required to be transmitted to the FSL within 72 hours of its seizer under S. 4 of the Control of Narcotic Substances (Government Analyst) Rules, 2001. **2011 SCMR 820 "Muhammad Aslam..Vs..The State", 2012 PCr.LJ 886 "Said Zareen..Vs..The State", 2018 YLR 1067 (Peshawar) "Imtiaz Ali..Vs..The State", MLD 2018 702 (Peshawar) "Shan..Vs..The State".** Further, PW.8 namely Zar Manan No.68 (Rtd) who allegedly took the parcels to

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FSL stated in his cross-examination that; *"The parcels were handed over to me by the I.O on 03.01.2017. The parcels were 74 in number. On 03.01.2017, I took the parcels to the FSL. The I.O handed over the parcels, however, I do not know that the same were lying in those custody."* There are two Investigating Officers in the instant case; one is Gul Rahman, SI (Rtd) and other is Saifullah, ASI. The former though has stated in his examination in chief that; *"I sent parcels No.1 to 74 to the FSL, vide my application, Ex.PW.6/4 alongwith road certificate Ex.PW.6/5".* He further stated that; *"Thereafter, I was transferred from the said PS to District Karak and rest of the investigation was conducted by Saifullah Khan".* Though this witness has not specifically stated that who had been given the parcels for transmitting the same to FSL but, PW.9 Abdul Haq No.247/LHC stated in his cross-examination that; *"The seizing Officer handed over to me the above mentioned parcels at about 10:00/10:30 PM. Parcel No.75 remained in my custody for 12 days till arrival of Haroon-ur-Rahman, IHC from PTC, Hangu. The parcels of the samples were sent to the FSL by OII".* On the other hand, PW.7 Saifullah, ASI stated that; *"On completion of investigation, I handed over the case file to the SHO for submission of interim challan".* In his cross-examination, he stated that; *"I myself have not sent the parcels to the*

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FSL, rather, the same were sent by my predecessor. Indeed, it is pertinent to mention here that interim challan was submitted by the complainant himself on 03.01.2017. On the same date, Rout Certificate Ex.PW.6/5 was prepared, none of the Investigating Officers stated that who had been given the parcels. Thus, it is established on the face of record that earlier Investigating Officer was not at all available in the Police Station on 03.01.2017 because of his transfer to District Karak and; astonishingly on which date the complainant submitted interim challan before the Court, then how the road/route certificate Ex.PW.6/5 was prepared on the date of sending the interim challan to the court. Handing over the parcel to PW.8 is an exaggerated story putforth by the above said PWs. The above referred contradictions are of such a nature that it has vitiated and shattered the intrinsic worth of the entire evidence so put forth by the prosecution

10. Now coming to the report of FSL (Ex-PZ) that; whether the same fulfills the requirement of Rule 6 of the (Government Analysts) Rules, 2001 or otherwise. The *ibid* report upon its perusal does not signify the test protocols that were applied to carry out the test; therefore, the mandatory requirement of law provided by Rule 6 has not been complied with in its letter and spirit; the noncompliance of the *ibid* Rule would render the said

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report inconclusive, suspicious and untrustworthy and; the same could not be relied upon qua maintaining the conviction and sentence of the accused/appellant in the circumstances, as it lacks evidentiary value. **2019 SCMR 930 Khair-Ul-Bashar V. The State** and **2020 SCMR 196 Muhammad Boota v. The State and another**. The ibid preposition was again reaffirmed by the august Apex Court in **Qaiser Javed Khan's** case reported in **PLD 2020 Supreme Court 57**. The relevant portion is reproduced below for ready reference;

"Now coming to the report of FSL (EX-PZ) that; whether the same fulfills the requirement of Rule 6 of the (Government Analysts) Rules, 2001 or otherwise. The ibid report upon its perusal does not signify the test protocols that were applied to carry out the test; therefore, the mandatory requirement of law provided by Rule 6 has not been complied with in its letter and spirit and; the noncompliance of the ibid Rule would render the said report inconclusive, suspicious and untrustworthy; which lacks the evidentiary value and the same could not be relied upon qua maintaining the conviction and sentence of the accused/appellant. 2019 SCMR 930 Khair-Ul-Bashar v. The State and 2020 SCMR 196 Muhammad Boota V. The State and another. PLD 2020 Supreme Court 57 Qaiser Javed Khan V. The State through Prosecutor General Punjab, Lahore and another. The relevant portion is reproduced below for ready reference;-

6. The Report of the Government Analyst in this case specifies only the tests applied and not the protocols thereof. The term "protocol" has not been defined in the Rules. Its dictionary

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meaning is: "A plan of scientific experiment or other procedure."⁴ It is also referred to as "the precise method for carrying out or reproducing a given experiments." These definitions are in line with the elaboration of the term "protocol" given in Imam Bakhsh wherein the Court stated the expression "protocol" to mean an explicit plan of an experiment, procedure or test. It is clarified that "protocol" is, therefore, a recognized standard method or plan for carrying out the test applied to ascertain the nature of the substance under examination. No test can take place without a protocol. The Report of the Government Analyst must show that the test applied was in accordance with a recognized standard protocol. Any test conducted without a protocol loses its reliability and evidentiary value. Therefore, to serve the purposes of the Act and the Rules, the Report of the Government Analyst must contain (i) the tests applied (ii) the protocols applied to carry out these tests (iii) the result of the test(s). This sequence, for clarity and better understanding can be envisaged as follows:

Test Applied	Protocols (applied to carry out the tests)	Results of the test(s)

7. Once the above three requirements under Rule 6 are contained in the Report of the Government Analyst, any ambiguity therein may be resolved by the Trial Court by exercising its power under Proviso to section 510, Cr.P.C. The said provision states that the Court may, if it considers necessary in the interest of justice, summon and examine the person by whom such report has been made. Therefore, the Trial Court while examining the said Report has the power to summon the Government Analyst in case there is any

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ambiguity in the said Report and seek clarification thereof. This clarification can only be based on the existing record of the Government Analyst and does not mean to allow the Government Analyst to conduct a fresh test or prepare another Report, for that would amount to giving the prosecution a chance of filling the gaps and lacunas in the Report. The Trial Court must also be mindful of the legal position that the per se admissibility of the Report i.e. without examining the Analyst (expert) does not vouch for its evidentiary value, as observed in Khair-ul-Bashar. The Courts are free to examine the contents of the Report and to assess its evidentiary value (weight), a matter distinct from its admissibility.

8. The Report of the Government Analyst in the instant case does not specify the protocols of the tests applied and thus does not meet the requirements of the law as interpreted by this Court in the cases of Imam Bakhsh and Khair-ul-Bashar (supra). The said Report cannot be relied upon for the conviction of the petitioner. Therefore, the petition is converted into an appeal and allowed. The conviction and sentence of the petitioner are set aside. He shall be released forthwith if not required to be detained in any other case."

11. Given that huge quantity of narcotic has purportedly been shown recovered from the secret cavities of Flying Coach being driven by co-accused Naqeeb-ur-Rahman; albeit, safe administration of justice mandates the Courts to be conscious of not the quantity of the contraband; but the quality of evidence produced

Naqeeb-ur-Rahman

before the Court in reaching to a correct and just decision of the case. **2010 SCMR 841 Shahzada..vs..The State** and **2020 P.Cr.LJ-321 (Peshawar) Abdul Baqi..vs..The State.**

12. Another ground which was made basis for conviction of the convict/appellant is that, he had allegedly made confession to his guilt before the Court of learned Judicial Magistrate. It depicts from record of the case that convict/appellant was arrested on 21.12.2016 and he remained for four days in police custody and; when produced on 25.12.2016 before the learned Judicial Magistrate for recording of his confessional statement; he refused to do so and; thus, was sent to Judicial Lockup. Whereafter, he allegedly made an application on 17.01.2017 to the Superintendent Jail for recording his statement, which was marked to the learned Session Judge Kohat; who further marked the same to the Judicial Magistrate and; his alleged confessional statement was recorded on 20.01.2017. The *ibid* application dated 17.01.2017 available on record of the case nowhere suggests that the accused intended to record his confessional statement; rather, he showed his desire to record his statement. Therefore, the alleged confessional statement could not be used for his conviction. Moreover, the convict/appellant subsequently retracted from his confessional statement and alleged the same to be illegal, recorded

without observing codal formalities i.e. without warning or opportunity for pondering over his confession. In order to properly assess intrinsic worth of the said confessional statement (Ex.PW.5/3) that whether the same was voluntarily, true and recorded after observance of due and codal formalities, this Court has thoroughly perused the same. In reply to Question No.7 *"Do you want to engage the counsel?"* the convict/appellant replied that; *"May be but not at present as I have no contact with my family."* which clearly suggests that no proper opportunity was provided to the convict/appellant to contact his family members or to engage his counsel; thus, the alleged confessional statement is not sufficient for maintaining the conviction of the appellant.

13. Therefore, in the given circumstances, this Court has no hesitation in holding that; prosecution has miserably failed to prove its case against the convict/appellant beyond reasonable doubt. The prosecution is under bounden duty not only to establish through unimpeachable evidence, the recovery of contraband, its safe transmission from spot to PS for its safe custody and; further to the Government Analyst for its chemical examination through an unbroken chain; as report/result of the Chemical Analyst plays a vital role for determining the guilt of an accused charged with the

offence. Such chain of custody is fundamental as report of Government Analyst is the main evidence against the accused and; it is for the Prosecution to establish that chain of custody unbroken, unsuspicious, safe and secure. Any break in the ibid chain i.e. safe custody or safe transmission would impair and vitiate the conclusiveness and reliability of the Report of Government Analyst thus rendering it incapable of sustaining conviction. **2019 SCMR 2004 Zahir Shah alias Shat.V..The State through Advocate-General, Khyber Pakhtunkhwa, 2018 SCMR 2039 State V. Imam Bakhsh.**

14. Therefore, in the given circumstances, the evidence so put forth by the prosecution is not only full of contradictions; but, is also based upon surmises and conjectures, which has created serious doubts in its case, therefore, the same could not qualify to be relied upon qua maintaining conviction and sentence of the convict/appellant under the safe administration of justice. Moreover, it is also settled that; whenever a reasonable doubt occurs in the case of prosecution its benefit is to be given to the accused, as a matter of right and not as a grace.

15. The prosecution could not offer any explanation regarding the said glaring variation much less plausible

and justifiable, which indeed has created a serious dent in its case. As earlier discussed that; where punishment for an offence charged with is death or life imprisonment, the evidence adduced by the prosecution before the trial Court must be of unimpeachable character; howbeit, the same is not the case here.

9. In view of what has been discussed above, the instant appeal is accepted and the impugned judgment dated 18.11.2019 passed by the learned trial Court is set-aside and; the convict/appellant is acquitted of the charges leveled against him under Section 9-C CNSA, 1997. He shall be set at liberty forthwith if not required in any other case.

Announced:
24.9.2020


JUDGE


JUDGE

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Hon'ble Mr. Justice Lal Jan Khattak, J.
Hon'ble Mr. Justice S M Attique Shah, J.