

JUDGMENT SHEET

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

Cr.A No. 08-M/2023

C.M No.10-M/2023

Khan Zada and one another.....(Appellants)

vs

The State(Respondent)

Present: M/S Ashfaq Ahmad Afridi and Farhana
Naz Marwat, Advocates for the
appellants.

Mr. Saeed Ahmad, Asst: A.G for the
State.

Date of hearing: 06.03.2023

JUDGMENT

Dr. Khurshid Iqbal, J.-

1. This criminal appeal u/s 24(a) of the
Khyber Pakhtunkhwa Control of Narcotic
Substances Act, 2019 (KP CNSA read with
Section 410 of the Cr.PC), was filed by Khan Zada
and Imran Khan (appellants) against the judgment
of learned Additional Sessions Judge/Izafi Zila
Qazi/Model Criminal Trial Court, Malakand at
Batkhela, passed on 05.01.2023, whereby both the
appellants were convicted u/s.9(d) of the KP
CNSA, 2019 and sentenced each to suffer rigorous
imprisonment for five years with imposition of
fine Rs.1,000,000/- (rupees Ten hundred

thousand); in default of payment of fine, they, each one of them was sentenced to further undergo six months simple imprisonment. However, the benefit of section 382-B Cr.P.C was extended to the appellants-accused.

2. Facts shortly are that on 28.07.2022, Subidar Umar Wahid of PC Batkhela received spy information about smuggling of narcotic substances for the purpose of sale in huge quantity by the appellants Khan Zada and Imran Khan from the house (of Imran Khan) situated in Umar-Khel Batkhela. On such information, he alongwith IHC Muhammad Azam, Madad Moharir Abdul Hassan and constable Iqrar Ali, rushed to the spot (they mentioned as Kucha Umar-Khel) situated at near the house of appellant Imran Khan. When they reached there, they came across the appellants at 17:20 hours. Imran Khan was found holding in his right hand a blue plastic wrapper and Khan Zada was having in his right hand a blue plastic wrapper. They overpowered both of them, recovered heroin from the plastic wrapper Imran Khan was holding and chars from the wrapper Khan Zada was having in his possession.

Umar Wahid

On weighing, the heroin was found as 2000 grams. The chars were in four packets. When weighed, packets No.1 to 4 were found to be 1266, 1253, 1268 and 736 grams, respectively (total 4523 grams). The Seizing Officer separated 10 grams from the heroin and 10 grams each from the packets of chars as representative samples for the purpose of chemical analysis. He put the samples and the remaining stuff of both the narcotic substances in seven parcels and sealed each parcel with monogram bearing UW. The Seizing Officer recorded the report of the incident in the shape of a *Murasila* (Ex:PA), which was converted into the FIR (Ex:"A") No.176 of 28.07.2022 u/s.9(d) of the KP CNSA, 2019, registered in the Levy Post Batkhela, District Malakand.

W. M. Khan

3. The final report of investigation (*challan*) was put in the trial court. Copies were supplied to the appellants in compliance with section 265-C, Cr.P.C. Charge was framed against them, to which, they pleaded not guilty and claimed trial.

4. In order to bring home the guilt of appellants, the prosecution examined as many as

05 PWs. In their examination u/s 342 Cr.PC, they were also afforded an opportunity for evidence in defence or their statements on oath in terms of section 340(2), Cr.PC. They did not avail those opportunities. After hearing arguments of the learned DPP for the State, learned counsel for the appellants, and perusal of the record, the learned trial Court convicted the appellants and awarded them the punishments referred to above vide impugned judgment dated 05.01.2023.

5. Ms. Farhana Marwat, learned counsel for appellant Imran Khan, and Mr. Ashfaq Ahmad Afridi, learned counsel for appellant Khan Zada, argued that the recovery was not proved beyond reasonable shadow of doubt. They emphasized that the one IHC Muhammad Azim Khan, an alleged witness of the recovery was not examined. They maintained that the aforesaid witness was not present on the place of the incident as he was busy in investigation of another narcotic case in which he produced the accused before Judicial Magistrate at the time when the present incident was reported

to have occurred. They also canvassed that the house of the appellant Imran Khan was depicted in the site plan but no evidence was collected to prove him either owner or tenant of the house. They argued that blue wrappers in which the narcotic substances were found were not shown in the recovery memo, nor were those produced. They also stated that all PWs are levy officials, as such, not independent witnesses.

6. Mr. Saeed Khan, learned AAG for the State submitted that the narcotic substances in question were recovered from the direct possession of the appellants. The recovery was proved reasonably. The prosecution successfully established the chain of safe custody and transmission of the narcotic substances. The samples were sent for chemical examination within the prescribe time. The FSL after examination returned a positive report about both kinds of the narcotics substances. The narcotic substances recovered from the appellants were of huge quantity.

Handwritten signature/initials

7. Perusal of record reflects that Subidar Umar Wahid and Abdul Hussain (the seizing officer/ PW2 and one of the marginal witnesses of the recovery memo/PW3) furnished evidence of the recovery. The summary of their depositions is that on 28.07.2022, pursuant to spy information, they alongwith other levy officials, rushed to Kucha Umar-Khel near the house of appellant Imran Khan situated in Umar-Khel, Batkhela. When the levy personnel reached near Shaheen Kucha, they parked their vehicle there and entered Kucha Umar Khel, where near the house of appellant Imran Khan, they came across the appellant Imran Khan and Khan Zada at 17:20 hours. They found each appellant was having a blue plastic wrapper. They overpowered both of them. They recovered heroin from the plastic wrapper Imran Khan was holding and chars from the wrapper Khan Zada was having in his possession. On weighing, the heroin was found as 2000 grams. The chars found in packets No.1 to 4 were weighed to be 1266, 1253, 1268 and 736 grams, respectively (total 4523 grams). The Seizing Officer separated 10 grams from the heroin and 10 grams each from the packets of

Wahid

chars as representative samples for the purpose of chemical analysis. He put the samples and the remaining staff of both the narcotic substances in seven parcels and sealed each of them with monogram bearing UW. The seizing officer recorded the report of the incident in the shape of a Murasila, prepared memo of the recovery proceedings in the presence of Constable Abdul Hussain (PW3) and IHC Azam Khan. He sent the Murasila and the parcels containing the case property to the Levy Post of Batkhela through PW3 and IHC Muhammad Azim, where it was converted into FIR.

8. Both PWs-2 and 3 were subjected to considerable cross examination. They remained steadfast in confirming the date, time and place of the incident; the mode and manner of the recovery; and the kind and quantum of the narcotic substances. They fully confirmed that the incident took place on 28.07.2022 at 17:20 hours, reported the same day at 18:50 hours and in Kucha Umar Khel in Batkhela. They also substantiated that the recovery of heroin was made from appellant Imran and of chars from appellant Khan Zada. PW2 supported the recovery by confirming that it was



carried out in his presence and that he put his signature on the memos as one of its marginal witnesses. However, certain aspects of their cross examination need analysis. The Seizing Officer was asked about the distance between the place of incident and the levy post of Batkhela. He replied that the aforesaid distance is about 2½ kilometers. He was further asked that in the Murasila he did not mention the fact that the police vehicle was parked in front of Kucha Shaheen and that there is also no mention of Kucha Umar Khel. Perusal of the Murasila would show that both the aforesaid places were mentioned in the Murasila though Kucha Umar Khel was mentioned in the head-note and Kucha Shaheen mentioned in the main text. During the arguments, learned counsel for the appellants could not convince this court that it has a substantial bearing on the case. There could be no gainsaying the fact that the murasila has to be read and evaluated in whole. One single sentence couldn't be packed and chosen in favour of one party and to the detriment of the other. The fact that both the appellants were apprehended in Kucha Umar Khel and recoveries made from their personal possession, is fully proved. The site plan prepared at the instance of the Seizing Officer



further supports the fact that the incident occurred in Kucha Umar Khel. Another aspect, on which, the Seizing Officer was questioned, was that the residents of Kucha Umar Khel were frightened and felt harassed. The Seizing Officer negated a suggestion to this effect. Next, he was asked about houses in Kucha Umar Khel, to which he replied that there is a vacant house (Kandar in Pushto) of Qazyar, which is adjacent to the house of appellant Imran and to the South of both of them was situated a vacant plot owned by Qazyar. He was not cross examined whether the residents of Kucha Umar Khel were present at the time of the occurrence. Though he admitted that there is no information in the Murasila whether the appellant Imran was the owner of the house or a tenant therein. This court is of the view it was not necessary. The reason simply is that the house of the appellant Imran was not raided. In other words, appellant Imran and Khan Zada were found inside the Kucha and not inside the house. In this view of the matter, there was no need to show that the house adjacent to the vacant Kandar of Qazyar was of the appellant Imran. It follows that the proof about the ownership or rent deed in favour of the appellant Imran would have been necessary



had the levy personnel raided the aforesaid house shown as that of Imran. The Seizing Officer in reply to a question, also admitted that he did not mention cash money and the cellphones in the possession of the appellants. This aspect, too, was not successfully canvassed as providing any leverage to the appellants. Same is the position of the fact that the Seizing Officer did not mention the form of the Chars. However, he explained on his own that it was in the form of slabs. He categorically denied that the incident did not occur at the place and time, and in the mode and manner as he reported.

9. Coming to the cross examination of PW3, it appears that his statement was recorded on the spot, a path from the main road leads towards the place of the incident, is situated at 250/300 paces from the main road and there was Abadi inside Kucha Umar Khel. He was asked about the house of appellant Imran. He replied that he had not seen the house of Imran and even stated that other levy personnel, too, had not seen it. As already discussed above, the house of appellant Imran has no impact on the merits of the case. On further questions, he replied that there was no

Muhammad Ali Khan

private person present on the spot at the time of the incident. He denied a suggestion that there is considerable population near around the place of the occurrence and that the residents were present at that time.

10. Now the recovery from the perspective of IHC Muhammad Azim Khan needs to be examined. The prosecution version is that the IHC Azim was amongst the levy personnel; he was present at the time of the recovery, signed the recovery memo as another marginal witness and took, alongwith PW3, the case property and the Murasila to the levy post. The prosecution did not examine him as a witness. The defence developed a plea during the cross examination of the Seizing Officer (PW2) that on 28.07.2022, the date, on which, the present case was registered, another case bearing FIR No.176 was also registered against a woman by the name Pari Begum, u/s.9(d) of the KP CNSA. The Seizing Officer admitted that in the aforesaid case FIR No.176, Azim was Investigating Officer and, as such, busy in the investigation right at the time while the incident in the present case occurred. During the examination



of the appellant u/s. 342 Cr.P.C, the defence produced attested photocopies of the FIR, applications for medical examination of the accused, recording his confessional statement and the order of the Judicial Magistrate. The order bears the time as 06:00 pm. The Seizing Officer denied a suggestion that Azim was not present with him at the place of the incident. He also denied a suggestion that on 28.07.2022 at 19:00 hours, Azim had taken the woman accused to the THQ Hospital, Batkhela.

11. As far as the production of the accused before the Judicial Magistrate is concerned, the time 06:00 pm mentioned therein is not a part of the text of the order. Rather it has been mentioned on the left margin of the page. If, it is presumed to be correct, even then, it still could not be believed. The reason is that the Seizing Officer was asked about the distance between the District Courts, the levy post Batkhela and the place of the incident in the instant case. In this respect, reference needs to be made to the relevant portion of the cross examination of the Seizing Officer:

Handwritten signature/initials

”قمانہ بٹ خیلہ اور جائے وقوعہ کا درمیان فاصلہ ڈھائی کلومیٹر ہوگا۔ عموماً اگر کوئی عدالت ہڈا سے بٹ خیلہ ہسپتال بذریعہ گاڑی جانا چاہے تو اس پر تقریباً چار منٹ لگتے ہیں۔ اگر رش ہو اور ٹریفک جام تو 15/20 منٹ بھی لگ سکتا ہے۔ بٹ خیلہ ہسپتال سے جوڈیشل حوالات ملائکہ کو بذریعہ گاڑی جب روڈ خالی ہو تو 15/20 منٹ تک کاراستہ ہے۔ اسی طرح دونوں جانب کا فاصلہ 30/40 منٹ کا ہوگا۔ اکثر اوقات جب کسی ملزم کو مجسٹریٹ کے سامنے پیش کیا جائے اور وہ جوڈیشل ہو جائے تو تفتیشی آفیسر ملزم کے ساتھ جیل جاتا ہے۔ از خود کہا کہ جب ایمر جنسی ہو تو ملزم کو دیگر لیویز اہلکاران کے ساتھ جیل بھیج دیا جاتا ہے۔“

12. The *Murasila* further supports this version as it notes the distance between the place of the incident and the levy post as two and half kilometer.


13. Another key aspect of the case is the safe shifting to, custody of the case property in the Levy Post and safe transmission to the FSL for chemical examination. PW2 testified that he, under the supervision of Azim took the case property, along with the *Murasila*, to the Levy Post, handed them over to Moharrir Zakir Hussain (PW5). Next, PW5 testified that he received the case property and the *Murasila* from PW2; the case property was entered in Register No. 19. He further deposed that the parcels containing the samples were given to

Handwritten signature

DFC Qaiser Khan (PW1) vide receipt *rahdari* (of serial No. 105 from the Register No. 21). DFC Qaiser Khan was examined as PW1. He fully confirmed having received the case property, taken it to the FSL vide the receipt *rahdari*, delivered it in the FSL, where its receipt was acknowledged and finally, he brought back the receipt to the Levy Post. The FSL report bears the belt No. of PW1 and the date of the receipt of the samples as 29/07/2022. The samples were sent to the FSL within the prescribed period of time and tested positive for the heroin and chars.

14. While under cross examination, PW 5 was asked about the name of father appellant Khan Zada as Mutabar Khan in Register No. 19. He admitted that due his clerical mistake he entered wrong name of father of the appellant. He then spelt out the name correctly, stating that it is Atlas Kha, not Mutabar Khan. He denied a suggestion that the since case properties of many cases are lying in the Levy Post, the levy personnel might have used the case property of some other case as the one in the present case. Similarly, PW1, under

cross examination, told that he went to the FSL in a passenger van (Coaster). He admitted that during the journey, the passenger van stays at restaurants for refreshments and prayers. But it was not brought from him that the van he was travelling in, did make a stay on the way. Even otherwise, the distance between Batkhela and village Landakay where the FSL is situated, is not that much which necessitates a break in the journey. But even then, a break in the journey would not necessarily means an opportunity to tamper with the samples of the case property. Indeed, PW1 denied a suggestion that the van had broken its journey on the way.

 **15.** IHC Asghar Khan (PW4) conducted investigation of the case. His testimony shows that he inspected the place of the incident, prepared the site plan at the behest of the Seizing Officer, drafted application to the FSL, arrested the appellants vide cards of arrests, interrogated the appellants, obtained copies of extracts of Registers Nos. 19 and 21, and examined the PWs under section 161 Cr.PC, including particularly the DFC

Qaiser Khan who took the samples to the FSL. He also placed on the record extracts from Register No. 19 and copies of the daily dairy showing the levy personnel's times of departure from and arrival back to the levy post. Though he was also asked certain questions about the house of the appellant Imran Khan, but this aspect has already been discussed threadbare above. He refuted a suggestion that he didn't inspect the place of the incident at all. He was also asked that more than one path—in addition to the one shown in the site plan—leads to the place of the incident. This aspect, too, was not successfully shown to have a bearing on the main core of the prosecution case that is the recovery of the narcotic substances from the personal possession of the appellants. He also refuted that during investigation, IHC Azim was busy in investigation of another narcotic case.

Wajid Ali Khan

16. Coming to the jurisprudence on the narcotics cases now, it is now established law that the narcotic substances' chain of safe custody in the Police Station and their safe transmission to the

FSL for chemical analysis must be proved beyond any reasonable shadow of doubt. Relevant cases are:

Mst. Sakina Ramzan v. The State, (2021 SCMR 451). Haji Nawaz v. The State, (2020 SCMR 687).

Amjad Ali v. The State, (2012 SCMR 577) Fayaz and another v. The State, (2022 MLD 1452) [Sindh (Hayaderabad Bench)]

Sajid Khan v. The State, (2021 YLR 296) [Peshawar].

17. In the facts and circumstances of the present case, however, the safe custody of the narcotic substances in the Levy Post and their safe transmission to the FSL was fully established. The above referred cases, thus, could be of no help. The defence counsels argued that private witnesses were not associated with the recovery proceeding.


18. As far the argument that all PWs are levy officials, it is now settled that police officials are as good witnesses as any other. In Liaquat Ali and another vs. The State (2022 SCMR 1097) [Supreme Court of Pakistan], the Supreme Court has observed:

“This Court in a number of judgments has held that testimony of police officials is as good as any other private witness unless it is proved that they have animus against the accused. However, no such thing could be brought on record by the petitioners in this case. This Court has time and again held that reluctance of general public to become witnesses in such like case has become judicially recognized fact and there is no way out to consider statement of official as good witnesses, as no legal bar or restriction has been imposed in such regard. Police officials are as good witnesses and could be relied upon, if their testimony remains un-shattered during cross-examination.”

19. Similarly, in Rehmat Gul vs.

The State 2022 P.Cr.L.J 10 [Peshawar],

this Court was of the view that:



“No doubt, the PWs are police officials but nothing in black & white is available on file to show their ill-will or enmity with the appellant to falsely implicate him in case.”

20. Another relevant case is of

Muhammad Faisal vs. The State (2022

YLR 1163) [Sindh]. Its relevant paras read:

“13. [...] (a) That the arrest and recovery was made on the spot and the appellant was caught red handed with the narcotics by the police whose evidence fully corroborates each other in all material aspects as well as the prosecution case. It is well-settled by now that the evidence of a police

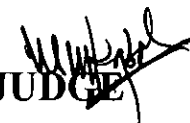
witness is as reliable as any other witness provided that no enmity exists between them and the accused and in this case no enmity has been suggested against any of the police PW's and as such the police had no reason to falsely implicate the appellant in a false case. Thus we believe the police evidence which is corroborative in all material aspects. In this reliance is placed on *Ijaz Ahmed v. The State* (2009 SCMR 99).

[...]

(h) That although no Independent mashir was associated with the arrest and recovery of the appellant it has come in evidence that no private person was prepared to become an independent mushir at the time of arrest and recovery despite being asked. Even otherwise section 103, Cr.P.C. is excluded for offences falling under the Control of Narcotics Substances Act, 1997 by virtue of section 25 of that Act. In this respect reliance is placed on the case of *Muhammad Hanif v. The State* (2003 SCMR 1237)."

21. In view of the above reappraisal of evidence, it is fully established that the prosecution has proved the charge against the appellants-accused by producing firm, reliable, cogent and trustworthy evidence. Resultantly, the appeal in hand stands dismissed being devoid of merits.

Announced
Dt: 06.03.2023


JUDGE

office w/R
06/04/23