

Judgment Sheet

**IN THE PESHAWAR HIGH COURT,
ABBOTTABAD BENCH.**

JUDICIAL DEPARTMENT

Cr.A No.141-A of 2016

JUDGMENT

Date of hearing.....18.09.2017.....

*Appellant...(Yaseen Ali) by M/S Malik Amjad Ali and Shehrish Habib,
Advocates....*

Respondent...(State) by Raja Muhammad Zubair, AAG

SYED MUHAMAMD ATTIQUE SHAH, J:-

Appellant, Yaseen Ali son of Dilawar Khan alongwith co-accused(convict), Hayat Khan son of Fazal Karim was tried by learned Additional Sessions Judge-VI/ Judge Special Court, Abbottabad, for the offence of recovery of five kilograms ‘charas’ and three kilograms of ‘heroin’, and convicted them under section 9-C CNSA and sentenced them to five years Rigorous Imprisonment each with fine of Rs.50,000/- each or in default of payment of fine, they shall suffer three months Simple Imprisonment and benefit of section 382-B Cr.P.C was also given to the them, vide judgment dated 27.10.2016. The appellant has challenged his conviction and sentence by filing the

instant appeal under section 48 of Control of Narcotic Substances Act, 1997. However, convict Hayat Khan has not filed any appeal before this Court against his conviction.

2. The case of the prosecution, as set up in case F.I.R No.234 (**Ex.PA**) dated 05.04.2016, for offence under Section 9 (c) of Control of Narcotics Substance Act, 1997 Police Station Havelian, Abbottabad, was that on 05.04.2016 at 12.00 hours, Junaid Khan, SHO Police Station Havelian alongwith Kamran, Bilal, Shoaib, Mazhar, Mohsin, constables and Saeed Akbar Head constable were present near Ayub Bridge opposite Kohisar Filling Station, Mansehra Road in connection with blockade (*Naka Bandi*), when a motorcar No.LEC-4165 white colour came from Haripur side. On noticing the police checking/Naka Bandi, the driver of motorcar took a 'U' turn towards Haripur but due to heavy traffic, he could not take away motorcar from the site of occurrence. The SHO alongwith police party upon reaching the car alighted the driver from the vehicle, who disclosed his name as Yasin Ali son of Dilawar Khan, resident of Katti Ghari, Mardan and while introducing himself as

Islamabad Police employee, has produced his service card. On suspicion, the person sitting on front seat was also overpowered and car was taken aside. He introduced himself as Colonel in Pak Army and disclosed his name as Hayat Khan son of Fazal Karim, resident of Khair Abad, Nowshera. Appellant Yaseen told that he was going to Abbottabad, Mansehra in order to distribute invitation cards of marriage ceremony of his cousin. However, on search of the car, two pairs of Islamabad police uniform lying on the rear seat alongwith three packets containing '*heroin*' and five packets having '*charas*' kept in secret cavity of rear seat were recovered. On weighing the contraband '*heroin*' and '*charas*' on the spot, the same was found to be three kilograms and five kilograms, respectively, which were taken into possession vide recovery memo (**Ex.PW3/1**). The SHO separated five grams from each packet of '*heroin*' and '*charas*' and sealed the same in parcels No.1 to 9 for chemical analysis. The complainant SHO drafted Murasila (**Ex.PA/1**) and sent the same to the PS for registration of the case against the appellant and co-accused-convict Hayat Khan. After completion

of investigation, challan of the case was sent to Judge Special Court for trial of the appellant and co-accused/convict Hayat Khan.

3. The present appellant alongwith co-accused (convict) was charged by the trial Court on 25.07.2016, which was denied by the appellant and co-accused-convict and they claimed trial. The prosecution produced five witnesses, including Ashfaq Ahmad, MHC (**PW-1**), who on receipt of Murasila, registered the case vide FIR (**Ex.PA**) and also sent the samples to the FSL for chemical analysis vide road Certificate (**Ex.PW 1/1**). Naseer Ahmad, constable (**PW-2**) took samples to the FSL, which were handed over by him in the laboratory vide receipt (**Ex.PW 1/1**). Kamran HC (**PW-3**) was marginal witness to recovery memo (**Ex.PW 3/1**) vide which (**PW-4**) recovered three KGs of 'heroin' and five KGs of '*charas*' from the back of rear seat of car No.4165 and separated samples therefrom and sealed the same in his presence. Junaid Khan, (**PW-4**) was complainant of the case, who recovered contraband 'chars' and 'heroin' from the rear seat of motorcar and separated samples therefrom for sending the same to

the FSL vide recovery memo (**Ex.PW 3/1**). He drafted Murasila and sent the same to the PS for registration of the case. He also prepared sketch (**Ex.PW 4/1**) of the place of occurrence and drafted application (**Ex.PW 4/3**) for sending samples of contraband to the laboratory. He arrested both the accused and handed over the investigation to PW-5, Ashiq Hussain, I.O. After completion of investigation, he submitted complete challan against the accused. (**PW-5**) Ashiq Hussain I.O conducted investigation of the case and issued card of arrest of accused (**Ex.PW 5/1** and **Ex.PW 5/2**). He verified the recovery sketch (**Ex.PW 4/1**) through eyewitnesses. He recorded statements of PWs under section 161 Cr.P.C. He placed on record positive report of FSL (**Ex.PW 5/6**) and extract from Register-19 (**Ex.PW 5/7**).

4. Thereafter, the present appellant alongwith co-accused-convict recorded his statement under Section 342 of Criminal Procedure Code, 1898, wherein, they pleaded innocence and false implication and denied the recovery of contraband, however, they wished not to produce defence or to be examined on

Oath as their own witnesses. The trial Court after considering the evidence produced by the prosecution, convicted the appellant and co-accused Hayat Khan and sentenced them, as mentioned hereinabove.

5. Arguments of the learned counsel for the parties heard and perused the record with their valuable assistance.

6. In this case, the prosecution relied upon the evidence of five witnesses, who all are police officials. However, on analysis of the evidence of the prosecution, we found noticeable contradictions on material aspects of the case in the statements of marginal witness (**PW-3**) of recovery memo Ex.PW 3/1 and complainant (**PW-4**), as the former stated that recovery was effected from the rear seat of the car No.4165, while the latter stated that he recovered the contra band from the secret cavities made behind the rear seat. However, at the time of exhibition of car, no effort was made by the prosecution to exhibit the secret cavities of the car. It is also evident from record of the case, that the car in question was also not examined by an expert with respect to the said secret cavities. PW-3, Kamran stated that the

Murasila (**Ex.PA/1**), recovery memo (**Ex.PW 3/1**) and site plan (**Ex.PW 4/1**) were in the handwriting of PW-4 and he put his signatures on these documents in his presence. However, there is marked difference between handwriting of *Murasila* (**Ex.PA/1**), site plan (**Ex.PW 4/1**) and recovery memo (**Ex.PW 3/1**) as well as signature of PW-4 thereon.

7. There are also noticeable discrepancies in the prosecution case. The complainant (PW-4) admitted during cross-examination that name of Constable Mohsin No.674 mentioned in *Murasila*, was not mentioned in Daily Diary No.13 and 20 (**Ex.PW 4/2**), showing departure and arrival of PW-4 alongwith police party to the police station. It is also important to note that the parcels mentioned in recovery memo (**Ex.PW 3/1**) mentioned the stamps in the name of “SK”, whereas, the name of PW-4 complainant is Junaid Khan, thus, the said parcels should have contain stamp of (**JK**) instead of (**SK**). It is also noteworthy that vide **Ex.PW 5/7** (copy of Register-19) parcels of samples were shown to have sent to FSL through Receipt No.86/21, whereas **Ex.PW 4/3** (Application for sending parcels to FSL) contained

number of receipt *Rahadari* as **84/21** instead of receipt No.**86/21**. Moreover, there is nothing available on record of the case, which could establish that the FSL has ever received the samples through Receipt No.**86/21** sent to it on 12.04.2016 for chemical examination. Apart from the above, the application (**Ex.PW 4/3**) also does not contain the date. Moreover, there was delay of one week in sending the said parcels to the FSL, as the alleged recovery was effected on 05.04.2016 and the parcels were received in the FSL, Peshawar on 12.04.2016 and no explanation has been furnished for the delay in sending the said samples. PW-1 has also admitted that there was overwriting on Ex.PW 1/1, having without any initial thereon. Additionally, nothing is forthcoming in the evidence of the prosecution with regard to safe custody of the samples during the intervening period. The aforementioned material contradictions and discrepancies created major dents in the case of prosecution against the appellant.

8. All these contradictions and discrepancies in the prosecution evidence create serious doubts about the recovery of contra band from the possession of the

accused, as alleged by the prosecution. It is well settled law that even a single doubt, if found reasonable, would entitle the accused person to acquittal and not a combination of several doubts. Reliance is placed on case titled **Ghulam Qadir Vs. The State** (2008 SCMR 1221), wherein, it has held that:

“It needs no reiteration that for the purpose of giving benefit of doubt to an accused person, more than one infirmity is not required, a single infirmity creating reasonable doubt in the mind of a reasonable and prudent mind regarding the truth of charge-makers the whole case doubtful. Merely because the burden is on accused to prove his innocence it does not absolve the prosecution to prove its case against the accused beyond any shadow of doubt in this duty does not change or vary in the case.”

Reliance is also placed on case law reported as **2009 SCMR 230** and **1995 SCMR 1345**.

9. Accordingly, for the reasons stated hereinabove, we hold that the prosecution has failed to prove its case beyond any reasonable doubt against the appellant, hence, we accept the appeal of Yaseen Ali, set aside the conviction and sentence awarded to him by the learned trial Court vide impugned judgment dated 27.10.2016 and while extending benefit of doubt to the appellant, acquit him of the

charge leveled against him in the present case. He be released forthwith, if not required in any other case.

Above are the detailed reasons for short order of this Court of even date.

10. So far as the case of co-accused convict Hayat Khan is concerned, though he has not filed appeal against his conviction before this Court, however, in view of the acquittal of appellant Yaseen Ali and keeping in view the peculiar facts and circumstances of the present case, when particularly his role is also not distinguishable from the appellant, both on legal as well as on factual premises, hence, it would be inappropriate to withheld the benefit of this judgment on the ground that he has not filed an appeal against his conviction before this Court. In this respect, this Court placed reliance on dicta of the august Apex Court in case titled **Muhabbat Ali and another Vs. The State (1985 SCMR 662)**, wherein, it was observed that:

“In view of the above discussion, we are satisfied that the prosecution has failed to establish the case against the appellants beyond reasonable doubt. We would, therefore, allow the appeal, and acquit the appellants, who should be set at liberty forthwith unless required in connection with some other case. As regards the non-appealing convict, Muhammad Ramzan, we direct that the benefit of acceptance of this

appeal shall also be extended to him who shall stand acquitted and will be set at liberty forthwith if not required in any other case. In granting such benefit to Muhammad Ramzan, we are supported by decision of this Court in the case of Muhammad Aslam and 5 others v. The State 1972 SCMR 194.”

Similarly, the august Apex Court has recently extended benefit of acquittal to non-appealing accused in **Hashim Qasim’s case** (2017 SCMR 986), and in this regard has observed that:

“So far as the case of non-appealing accused, Shoaib Ahmed is concerned, as we have already mentioned that notice for enhancement of sentence was given to him in Crl. P. 161/13, and when his case too is not distinguishable on any factual and legal premises from the appellants, therefore, he is also entitled to and deserves the same treatment. Reference may be made to the cases of Haji Syed Rafi Ahmed v. Additional Sessions Judge, Rawalpindi and others (PLD 1992 SC 251) and Muhabbat Ali v. The State (1985 SCMR 662). Accordingly, he (Shoaib Ahmed) too is extended the benefit of doubt and is acquitted of all the charges leveled against him. All the accused, including Shoaib Ahmed (non appealing accused) be set free forthwith, if not required in any other case.”

(Emphasis provided)

11. Therefore, while drawing wisdom from the aforementioned decisions of the august Apex Court, we also extend the benefit of this judgment to

the non-appealing convict (**Hayat Khan**). He is, therefore, acquitted of the charges leveled against him in this case. He be also released forthwith, if not required in any other case.

J U D G E

Announced.
Dt.18.09.2017.

J U D G E

/*M.Saleem*/