

*Judgment Sheet*

**PESHAWAR HIGH COURT, MINGORA BENCH/  
DAR UL QAZA, SWAT**

JUDICIAL DEPARTMENT

**J U D G M E N T**

**Cr.A. No. 246-M/2016.**

**Date of hearing .... 14.02.2018.**

**Appellant: (Siraj-ud-Din) by Qazi Farid Ahmad,  
Advocate.**

**Respondents: (the State & 1 another) by Mr.  
Rahim shah, Astt: Advocate General.**

**MOHAMMAD IBRAHIM KHAN, J.-**

This is an appeal under section 410 of the Code of Criminal Procedure against the verdict rendered in Special Court Case No. 30/ CNSA of the year 2016 dated 21.11.2016. The learned Sessions Judge/Judge Special Court/Zila Qazi Swat on implication of the accused/Appellant Siraj-ud-Din in case FIR No. 185 dated 22.02.2016 registered at Police Station Mingora District Swat convicted and sentenced him under sections 9 (c) CNSA as under:-


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- i. *Under section 9 (c) CNSA to 3 years rigorous imprisonment along with fine of Rs. 30,000/- or in default thereof shall further suffer 3 months SI. However, benefit of section 382-B Cr. P.C. was extended to the accused/Appellant.*

2. The version of prosecution as advanced through '*Murasila*' followed by lodging of the First Information Report would reveal that the complainant Salim Khan ASI in view of prior spy information that accused/Appellant has been involved in selling of narcotics on large scale. Therefore, as per instance of the informer he (complainant) along with other police party apprehended the accused at a place of occurrence i.e. known as people *Chowk* Mingora. During his personal search, the police recovered a plastic bag from his right hand which contained packet, out of which, on further search 1069 grams Chars were recovered. The police also recovered sale proceed of Rs. 9,000/- comprised upon notes of different denomination. Thereby, out of the recovered Chars 5 grams were separated for chemical analysis while the rest were sealed into separate parcel.

3. Thereafter, the learned Sessions Judge Swat being in the capacity of Judge Special

Court charge-sheeted the accused/Appellant on 13.05.2016 and when he did not plead his guilt. The prosecution examined Akhtar Ayub SHO as PW-1, Mian Sahibullah *Madad Muharir* as PW-2, the complainant/Seizing Officer as PW-3, Asad Constable as PW-4, Sher Bahader ASI as PW-5, Muhammad Haleem Khan ASHO as PW-6 and under the statement of Mr. Mularab Khan learned Public Prosecutor Swat, evidence of the prosecution was put to an end.

4. At the end, the accused/Appellant was examined under section 342 Cr.P.C. He negated his involvement in this case and posed innocence. After hearing the parties at length the decision under conviction for the sentences was delivered.

5. Having heard arguments of learned counsel for the accused/Appellant and learned  Astt: Advocate General appearing on behalf of the State, record gone through with their assistance.

6. Learned counsel for the accused/Appellant referred to **2008 YLR 1562**

*(Lahore) " Muhammad Younis V/S The State"*

with particular reference that the Seizing Officer was below the rank of Sub-Inspector, 2004 YLR

1303 (Lahore)" Muhammad Yasin V/S The

State on the same analogy and 2016 P Cr. LJ

1234 (Lahore) " Shahid Mehmood V/S The

State, wherein in view of the contradictory

statements of the recovery memo the then an

accused/Appellant was given the benefit of

doubt by way of his acquittal.

7. It appears from the record that on the

basis of prior spy information, the

complainant/Seizing Officer by the rank of ASI

along with other police officials apprehended the

accused at the instance of informer and out of

his personal possession recovered Chars 1069

grams along with sale proceed of Rs. 9,000/-.

The very contents of 'Murasila' followed by

lodging of the First Information and even the

charge so framed against the accused/appellant

would reveal that the recovery of contraband

Chars was effected in thickly populated area i.e.

'People Chowk Mingora' and that too in view of

prior spy information. Yet all the prosecution witnesses are police officials, this Court is also conscious of the fact that the police officials can be as good witnesses as compared to private witnesses and in some cases even can better present the prosecution version before the competent Courts of law. But in context of the present case, the situation is little bit different, as the alleged recovery has been admittedly effected from *Shahi* road then it was boundan duty of the prosecution to least associate some private or independent witnesses with the recovery process in the eventuality when the police party in general and the Seizing Officer in particular was aware of the place of occurrence due to prior spy information.

8. It is also an admitted fact surfacing on the record that the alleged recovery of contraband Chars was made by an official of Police Department below the rank of Sub-Inspector in violation of Section 21 of the Control of Narcotic Substances Act, 1997.

Though, in some area this privilege has been

extended to officials of lower rank, but that differentiation existed in special parts of the country like District Chitral where the Scout officials have been given these powers under the gazette Notification. But in this part of country i.e. District Swat, this concession has not yet been extended. In this regard, reliance has been placed on 2008 YLR 1562 (Lahore) "Muhammad Younis V/S The State". The relevant of the *ibid* judgment speaks of:-

*-----Ss.9(b), 21 & 22---Investigation conducted by an Assistant Sub-Inspector of Police---Validity---Police Officer of the rank of an A.S.-I. had raided the accused, recovered the narcotic substance, prepared the recovery memo. and, thus, had practically conducted the entire investigation---Investigations carried out by an A.S.-I. were violative of Ss.21 and 22 of the Control of Narcotic Substances Act 1997, because an officer below the rank of Sub-Inspector of Police could not seize in any public place and had no authority to search and arrest a person for recovery of narcotics---Said proceedings carried out by Assistant Sub-Inspector of Police and recovery memos prepared by him had no legal force and could not lead to conviction---Prosecution had failed to prove its case in a legal manner---Accused was acquitted in circumstances.*

Same view has further been affirmed by the case law cited as 2004 YLR 1303 (Lahore) " Muhammad Yasin V/S The State", wherein it has been held:-

*---Ss.9(c), 21 & 22---Appreciation of evidence--- Entire investigation in the case had been made by Assistant Sub Inspector of Police who had recovered narcotic substances, made them into sealed parcels, prepared their sample sealed parcels and also drafted its recovery memos. as well the complaint and also recorded statements of witnesses who attested recovery memos.--- Validity--- Investigations carried out by said police officer. were violative of Ss.21 & 22 of Control of Narcotic Substances . Act; 1997---Officer below the rank of Sub - Inspector of Police could not seize in any public place and had no authority to search and arrest a person for recovery of narcotics--- Proceedings` of search, arrest and recovery, could not be processed or carried out by Assistant Sub-Inspector of Police axed recovery memos. prepared by him carried no legal force and accused on basis of investigations carried out by said officer could not be convicted--- Assistant Sub Inspector of Police having carried out entire investigation in violation of mandatory provisions of S.21 of Control of Narcotic Substances Act, 1997, conviction and sentences awarded to accused were set aside and he was acquitted of charge against him.*

9. In case of narcotics primary importance has been attached to the mode and manner of the alleged recovery of contraband Chars. In context of the present case, the Seizing Officer Saleem Khan stated in his cross-examination that the accused at the time of alleged recovery on sighting the police did not

try to decamp from the spot, as he could easily make his presence whisk off from the place of recovery being thickly populated area. This PW further deposed during cross-examination that no test purchase was obtained from accused. Above all, PW-4 Asad Constable totally negated the version of prosecution to the effect that the alleged contraband Chars was recovered from the pocket of 'Bunyian' (بنیان) of the accused, whereas it is case of the prosecution that the recovery of Chars was effected from the packet wrapped up in the plastic bag held by the accused at the relevant time in his right hand.

10. Moreover, the samples separated for chemical analysis of the FSL has been sent to the concerned Laboratory via receipt No. 168/21 dated 23.02.2016 through Muhammad Hussain Constable No. 2198, but this important witness has not been examined by the prosecution in order to further authenticate the veracity of FSL report which though received in positive to the effect that the recovered contraband is Chars.

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11. In view of the above discussion, we are of the firm view that the prosecution failed to prove its case against the accused/Appellant beyond any shadow of doubt; therefore, his conviction cannot be maintained, ergo, while extending the benefit of doubt, we accept the appeal filed by the Appellant by setting aside his conviction and sentence acquit him of the charges levelled against him. He be set free forthwith, if not required in any other case. More so, the seizing officer PW-3 Saleem Khan states that he weighed the contraband Chars twice but PW-4 Asad Constable No. 1737 states that in his presence only once the weighment was carried out, which further creates doubt as to its weighment.

12. Last but not the least there are some glaring discrepancies in the statements of PWs. Accordingly the accused/Appellant was apprehended at 09:00 hours whereas, the most important PW-4 Constable Asad No. 1737 witness to the recovery memo states that they had come to the place from where the

accused/Appellant was apprehended, the time was 09:30 AM, meaning thereby that the exact time of arrest is still a mystery.

12. Since accused/Appellant has already been released on bail by this Court within the meaning of Section 426 Cr.P.C on 19.12.2016, therefore his sureties are also discharged from the liability of bail bonds.

Announced.  
Dt. 14.02.2018

  
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