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Judgment Sheet

IN THE LAHORE HIGH COURT, MULTAN BENCH MULTAN

JUDICIAL DEPARTMENT

Criminal Appeal No.549 of 2023

(Nayyar Abbas. Vs. The State etc.)

JUDGMENT

DATE OF HEARING:	**13.02.2024**.
APPELLANT BY:	Ch. Umar Hayat, Advocate assisted by M/s. Amer Manzoor, Muhammad Waqas Anjum and Syed Naeem Ali, Advocates.
STATE BY:	Mr. M. Abdul Wadood, Addl. Prosecutor General and Malik Riaz Ahmad Saghla, Deputy Prosecutor General.

ANWAARUL HAQ PANNUN, J:- Nayyar Abbas, the appellant, was tried in criminal case registered vide F.I.R No.458/2022 dated 16.08.2022, offence under Section 9(c) of the Control of Narcotic Substances Act, 1997, at Police Station Qadirpur Raan, Multan, as allegedly recovery of two packets of *charas* total weighing 2250 grams was effected out of his possession.

2. After usual investigation, the appellant was sent up to face trial. Formal charge was framed against the appellant to which he pleaded not guilty and claimed trial. The prosecution examined five witnesses i.e. Sanobar Ali, ASI (PW-1/complainant), Muhammad Hanif, S.I (PW-2/Investigating Officer and transmitter of case property), Abdul Majeed, 2713/C (PW-3/witness of recovery memo Exh.PA), Asif Sultan, 938/HC (PW-4/scribe of formal FIR and Moharrar of police station) and Abdul Razzaq, 1314/C (PW-5/transmitter of complaint Exh.PA) to prove the charge. Thereafter, statement of the appellant under Section 342 Cr.P.C was recorded, in which he refuted all the allegations levelled against him and professed his innocence. The appellant did not opt to appear as his own witness under Section 340(2) Cr.P.C, however, he

produced the documents (Ex.DA, Ex.DB and Mark-C) as his defence evidence. On conclusion of trial, the learned trial Court, vide its judgment dated 15.05.2023, has convicted the appellant under Section 9(c) of C.N.S.A, 1997 and sentenced him to five years and six months R.I. along with fine of Rs.25,000/- and in default thereof to further undergo five months and fifteen days S.I. Benefit of Section 382-B Cr.P.C has, however, been given to the appellant.

3. Arguments heard. Record perused.

4. The legislature in its own enviable wisdom, while consolidating and amending the laws relating to criminal procedure, at the fag end of 19th Century, enacted the Code of Criminal Procedure (Act of V of 1898) which is commonly known as the Code. It came into force on the first day of July 1898. The Code provides a uniform law of procedure so far as criminal branch of administration of justice is concerned. The Code also contains in it the provisions specifying the procedure, including the mode and manner along with the authority for making search either of a person or a place besides enumerating the circumstances warranting such exercise. A police officer is authorized to search a person if arrested by him under a warrant providing for taking of bail or without warrant or by a private person. A search may be made of such person for placing in safe custody all articles other than necessary wearing apparels found upon him; a mode of searching of a woman has to be made, if necessary, by another woman with strict regard to decency; the police officer is also authorized to arrest any person without warrant, in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; the officer in-charge of a police station or a police officer making an investigation, having reasonable grounds for believing that anything necessary for the purpose of investigation into an offence which he is authorized to investigate, may be found in any place within the limits of police station, of which he is in-charge or to which he is attached and that such thing cannot in his opinion otherwise be obtained

without undue delay may after recording in writing the grounds of his belief and while specifying in such writing so far as possible, the thing for which search is to be made, make such search or cause such search to be made for such thing in any place within the limits of such police station; the officer incharge of police station is required another to issue search warrant. [Under Sections 51, 52, 54, 165 and 166 Cr.P.C. respectively]. The **Chapter VII Part-D of Cr.P.C is comprised over General provisions relating to searches i.e. 101 to 105,** out of which, the provision of Section 103 Cr.P.C specifically requires that whenever a search of a place is to be made by a police officer under this Chapter, two or more respectable inhabitants of the locality are required to attend and witness the search. He may issue an order in writing to them or any of them to associate with search, consequently the search shall be made in presence of such witnesses and a list of all things seized in course of said search and of places in which they are respectively found, shall also be prepared by such officer or other person and it shall also be signed by such witnesses. **No person witnessing the search under this Section shall be required to attend the Court as a witness of search unless he has specifically been summoned by the Court.** Moreover, the occupant of place searched or some person on his behalf shall in every instance be permitted to attend the search and a copy of list prepared and signed by the said witness shall be delivered to such occupant or person incharge of the close place allowing such search at his request. This provision of law has been subjected to interpretation by the Superior Courts. A judicial consensus has however emerged to the effect that Section 103 Cr.P.C is not stricto senso applicable where accused in pursuance of making of his disclosure, during investigation leads to some recovery. Similarly, in case, the recovery is effected from personal search of an accused or otherwise, by the police officer, the requirement provided for showing a reason for not doing so, association of two respectable persons of the locality may be dispensed with. Unless it is shown by the prosecution that in the circumstances of the case it was not possible to have two musheer from the public, the requirement of two

members of the public of the locality in recovery proceedings is mandatory. The police officials, in absence of any malice or grudge against the accused, on their part, had also been held to be as good witnesses of recovery as the respectable of the locality.

5. The United Nations (UN), International Organization was established on October 24, 1945. The United Nations (UN) was the second multi-purposes international organization established in the 20th century that was worldwide in scope and membership. Its predecessor, the League of Nations, was created by the Treaty of Versailles in 1919 and disbanded in 1946. According to its Charter, the UN aims:-to save succeeding generations from the scourge of war,….to reaffirm faith in fundamental human rights,… to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom. In addition to maintaining peace and security, other important objectives include developing friendly relations among countries based on respect for the principles of equal rights and self-determination of peoples; achieving worldwide cooperation to solve international economic, social, cultural, and humanitarian problems; respecting and promoting human rights; and serving as a center where countries can coordinate their actions and activities toward these various ends. By and large all **the nations/ countries after becoming its members and signing undertake to fulfil their obligations duly caste upon them being signatories of the charters protocols etc.** Through certain International Conventions various steps have been taken by the members of the United Nations at various times. The convention against psychotropic substances done at Viena on 21st February 1971 followed by the Single Convention on Narcotic drugs done at New York on 30 March i.e. (i) The Single Convention on Narcotic Drugs done at New York on the 30th March, 1961, as amended by the 1972 Protocol done at Geneva on the 25th March, 1972; (ii) The Convention Against Psychotropic Substances done at Vienna on the 21st February, 1971; (iii) The United Nations

Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances done at Vienna on the 20th December, 1988.

6. The legislature deeming it expedient to consolidate and amend the laws relating to narcotic drugs, psychotropic substances, [controlled substances] and control the production, processing and trafficking of such drugs and [to provide for forfeiture of property derived from or used in illicit traffic in narcotic drugs, psychotropic substances and controlled substances and to implement the provisions of the International Conventions on narcotic drugs, psychotropic substances and controlled substances]; passed a special law, having overriding effect on other laws on the subject, in the form of The Control of Narcotic Substance Act (XXV) of 1997 hereinafter to be called as CNSA and it received the assent of the President of Islamic Republic of Pakistan on 7th July, 1997 as required under Article 75 of the Constitution. Pakistan is an abiding member of the United Nations(UN). For achieving its object as aforesaid, behind the legislation, the provisions contained in Chapter III "SEARCH AND INVESTIGATION" of CNSA also provide a mechanism for conducting the proceedings viz-a-viz search and investigation. These provisions (20 to 24) distinctly deals with the power to issue warrants; entry, search, seizure and arrest without warrant; seizure and arrest in public place; stop and search conveyance; under cover and controlled delivery operations. However, under Section 25 of CNSA, except the provision of Section 103 of Cr.P.C, the remaining provisions of Code, have mutatis mutandis, been made applicable to all searches and arrest in, so far as, they are not inconsistent with the aforesaid Provisions of the ibid Act. **It is important to point out that as a result of arrest of a suspect or search of a place, as aforesaid, committing or disclosing the commission of an offence under this Act, as a mandatory legal requirement, a document has to be prepared, showing the recovery made either from the possession or on pointing out of an accused. Such document also known as recovery memo, is deemed to be a foundational document particularly in case of theft and the cases**

under CNSA, to undertake further investigation after registration of a formal FIR. One of the object behind preparing the recovery memo at the spot with its due attestation by the witnesses is to ensure the fairness of the process of recovery so as to exclude the possibility of fabrication, misappropriation or damage to the seized articles either to favour an accused or for his false implication. The recovery memo must contain all relevant particulars of the things seized or taken into possession to establish its identity beyond any doubt. The requirement behind attestation of a recovery memo by the marginal witnesses at the spot is a part of an attempt to ensure that the recovery has transparently been effected as fulfillment of such requirements is necessary to exclude the possibility of false implication or any manipulation prompted by the human weaknesses and to prevent the abuse of process of law and misuse of authority. The attestation of the recovery memo by two witnesses acting as musheer also ensures that a single person at his whims may not abuse the process of law and misuse his authority. The preparation of such recovery memo is also necessary to prove the case by the prosecution at trial against the accused. The Hon'ble Supreme Court in the case of *"Zafar Khan and others Vs. The State"* (2022 SCMR 864) emphatically held as under:-

> *"In the cases of narcotic substances, recovery memo is a basic document, which should be prepared by the Seizing Officer, at the time of the recovered articles, containing a list thereof, in presence of two or more respectable witnesses and memo to be signed by such witnesses. The main object of preparing the recovery memo at the spot and with signatures of the witnesses is to ensure that the recovery is effected in presence of the marginal witnesses, honestly and fairly, so as to exclude the possibility of false implication and fabrication. Once the recovery memo is prepared, the next step for the prosecution is to produce the same before the Trial Court, to prove the recovery of the material and preparation of the memo through the scribe and the marginal witnesses."*

7. It may further be observed that the fulfillment of above emphasized mandatory requirement in preparation of a recovery memo,

is also essential for framing of a charge by the Court. The framing of a proper charge against the accused under Chapter XIX of Cr. P.C, enables him to defend his position. It has rightly been held in case of *"Mumtaz Ali and another Versus The State"* **(2000 P Cr.L J 367[Karachi])** by an Hon'ble Division Bench that *"the charge must contain all material particulars as to time, place as well as specific name of the alleged offence, the manner in which the offence was committed and the particulars of the accused so as to afford the opportunity to explain the matter with which he is charged. The purpose behind giving such particulars is that the accused should prepare his case accordingly and may not be mislead in preparing his defence."* A defective charge seriously prejudice the cause of the accused. The fulfilment of abovesaid requirement is also relevant to achieve the objects deeply ingrained in the provision of Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973 as a one of the fundamental right, which requires that *"For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process."*.

8. While taking into consideration the relevant provisions of law, i.e. Code of Criminal Procedure, 1898, Police Rules (22.16, 22.18, 22.70, 27.11, 27.12) of 1934, Qanun-e-Shahadat Order, 1984(X of 1984), [The Lahore High Court Rules and Orders (civil and criminal) ("High Court Rules") Part-B of Chapter 24 of Volume III], [Control of Narcotic Substances (Government Analysts), Rules 2011], rules and case law on the subject as to the case property and exhibition thereof, the Hon'ble Supreme Court of Pakistan in the case of *"Ahmad Ali and others Versus The State"* **(2023 SCMR 781)** except the form of recovery memo, thus the same is being dealt with hereinafter, has exhaustively dealt with this subject. The Police Act of 1861, was one of such a piece of legislation, which was adopted through the adoption of Central Acts and Ordinances Order of 1949, repealed by the Police Order, 2002. The Police Rules 1934 framed under the Police Act 1861 have however been protected under Article 185 of the Police Order, 2002. Rule 22.16 of the Police Rules, 1934 ("the Police Rules") deals with the **"Case property"**.

Sub-rule(1) thereof requires, inter alia, that in certain circumstances, police shall seize weapons, articles and property in connection with criminal cases taking charge of property which is unclaimed i.e. *when the officer in-charge of police-station forwards an accused person to a Magistrate or takes security for his appearance before such Magistrate under this section, he shall send to such Magistrate any weapon or other article which it may be necessary to produce before him, and shall require the complainant (if any) and so many of the persons who appear to such officer to be acquainted with the circumstances of the case as he may think necessary to execute a bond to appear before the Magistrate as thereby directed and prosecute or give evidence (as the case may be) in the matter of the charge against the accused; in the course of searches made in Police Stations; Search of arrested person; Search by Police Officer making an investigation; when officer incharge of Police Station may require another to issue search warrant; inspection of weight and measures; Powers to Police to seize property suspected to be stolen; and with regard to unclaimed property and* ***(g) under the provision of local and special laws. [***Sections i.e. 170, 51, 165, 166, *153, 550 of Cr.P.C, 25 of the Police Act]*. Sub-rule (2) thereof provides, inter alia, that each weapon, article or property (not being cattle) seized under the above sub-rule shall be marked or labelled with the name of the person from whom, or the place where, it was seized, and reference to the case diary or other report submitted from the police station. If articles are made up into a parcel, the parcel shall be secured with sealing wax, bearing the seal impression of the responsible officer, and shall similarly be marked or labelled. Such articles or parcels shall be placed in safe custody, pending disposal as provided by law or rule. Sub-rule (3) thereof provides, inter alia, that the police shall send to headquarters or to magisterial outposts all weapons, articles and property connected with cases sent for trial, as well as suspicious, unclaimed and other property, when ordered to do so by a competent Magistrate. Sub-rule (4) thereof provided, inter alia, that motor vehicles detained or seized by the police in connection with cases or accidents shall be produced before a

Magistrate after rapid investigation or by means of in-complete challan. The evidence relating to the identity or condition of the vehicle should be led and disposed of at an early date, and the Magistrate should then be invited to exercise the discretion vested in him by section 516-A, Code of Criminal Procedure, to order that the vehicle be made over to the owner pending conclusion of the case on security to be produced wherever demanded by the Court. It may be observed that the police rules are fully invokable and are to be followed by the police officer while conducting investigation and in Chapter-XXV, Rule 25.23 (1) (a), (b) and (c) of the Police Rules, 1934, a synopsis of a model form for preparing a memo of recovery or things to be seized under Section 103 of Cr.PC has been prescribed which can be used by making besuiting changes in it. Although under the provision of Section 25 of CNSA, except Section 103 Cr.P.C, rest of the provisions of the Code of Criminal Procedure, have been made applicable mutatis mutandis, to all searches and arrests in so far as they are not inconsistent with the provision of Section 20,21,22 & 23 of the Act and no bar has been placed against following the police rules, regulating the investigation i.e. the process of collection of evidence. It may be observed that Section 25 of CNSA, only bars the requirement of association of two respectable persons from the locality when the search is made of a house and the association of the person or inmate of the house or the place, as observed hereinabove, in the preceding paragraph No.4 of the judgment.

9. We have noticed that recovery memo of *charas* (Exh.PA) neither contains the number nor the date of the F.I.R nor the name of police station. When the complainant (PW-1) was confronted with the aforementioned factum of non-mentioning the number of FIR, date and name of police station in the recovery memo (Exh.PA), during his cross-examination, he had replied as follows:-*"When Abdul Razzaq returned at the spot while taking FIR with him I got mentioned the case FIR number on recovery memo as 458/22. At this stage, the witness has perused the record and replied and case FIR number is missing. He further has deposed that the said case FIR number is also not available*

on recovery memo." PW-1 has further admitted that *"in recovery memo Exh.PA there is no specific mention of place where the contraband was allegedly recovered from the accused"*. Furthermore, the recovery witness (PW-3) in his cross-examination has also deposed that *"I don't remember as to what case FIR number was written on the recovery memo Exh.PA at the time when I signed the same"*. In view of aforementioned depositions of the PWs, serious doubt is caste upon the authenticity of preparation of recovery memo (Exh.PA). Moreover, tenor of the testimonies of aforesaid prosecution's witnesses clearly reveals that the recovery memo (Exh.PA) was prepared after registration of the F.I.R in this case, therefore, no legal sanctity can be attached to such document. In the above context, reliance is placed on the dictums reported as *Zafar Khan and another vs. The State* **(2022 SCMR 864)** and *The State through Advocate-General, Khyber Pakhtunkhwa, Peshawar vs. Fayaz Khan* **(PLD 2019 Federal Shariat Court 21)**. It is cardinal principle of criminal jurisprudence that a single instance causing a reasonable doubt in the mind of the Court entitles the accused to the benefit of doubt not as a matter of grace but as a matter of right. Moreover, once a single loophole/lacuna is observed in a case presented by the prosecution, the benefit whereof in the prosecution case automatically goes in favour of an accused. Reliance in this regard is placed on the dictums reported as *Daniel Boyd (Muslim Name Saifullah) and another v. The State* **(1992 SCMR 196)**; *Gul Dast Khan v. The State* **(2009 SCMR 431)**; *Muhammad Ashraf alias Acchu v. The State* **(2019 SCMR 652)**; *Abdul Jabbar and another v. The State* **(2019 SCMR 129)**; *Mst. Asia Bibi v. The State and others* **(PLD 2019 SC 64);** *Muhammad Imran v. The State* **(2020 SCMR 857)** and *Muhammad Imtiaz Baig and another v. The State through Prosecutor General, Punjab, Lahore and another* **(2024 S C M R 1191)**. Therefore, the conviction and sentence recorded by the learned trial Court against the appellant through the impugned judgment dated 15.05.2023 are set aside and he is acquitted of the charge. The appellant

is in jail, he shall be released forthwith if not required in any other case. Accordingly, this appeal is **allowed**.

(CH. ABDUL AZIZ)
JUDGE

(ANWAARUL HAQ PANNUN)
JUDGE

APPROVED FOR REPORTING.

JUDGE **JUDGE**

Siddique