

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
PESHAWAR
(Judicial Department)

J.Cr.A. No.275-P/2011

Date of hearing: **03.06.2015**

Date of announcement: _____

Appellant (s) : _____

Respondent (s) : _____

JUDGMENT

ASSADULLAH KHAN CHAMMKANI, J.- This appeal has been filed by appellant ***Majid Sarwar*** from Jail, against the judgment dated 24.03.2011, rendered by learned Judge Special Court (CNS) Khyber Pakhtunkhwa, Peshawar, whereby he has been convicted and sentenced under section 9 (c) Control of Narcotic Substances Act, 1997, to undergo life imprisonment and to pay a fine of Rs.1,00,000/-

or in default thereof to undergo 01 years S.I. further.

2. On receipt of information qua trafficking of huge quantity of narcotics by one Majid Sarwar, from Peshawar to Punjab via Peshawar Motorway, through vehicle IDM-2722, Mumtaz Hussain SI (PW.3) alongwith other ANF officials, on 02.01.2010 conducted a barricade near Toll Plaza Motorway Peshawar. At 09.15 hours, the aforesaid motorcar came from Peshawar side which was intercepted, its driver was apprehended, who on query, disclosed his name as Majid Sarwar (appellant-convict herein). On cursory interrogation, he disclosed about concealment of narcotics in secret cavities of the vehicle. On his pointation 30 packets chars Gardha, each weighing one Kilogram, making

the total of 30 Kilograms, 69 packets Chars Pukhta, each weighing one Kilogram, making the total of 69 Kilograms and one packet opium weighing 750 grams, were recovered from secret cavities of the motorcar. From each packet of the recovered chars and opium, 10/10 grams were separated as samples for the purpose of chemical analysis by the FSL and sealed in separate parcels. The remaining quantity was sealed separately. On personal search of the accused, Mumtaz Hussain S.I. (PW.3), recovered Nokia mobile set, registration book in the name of one Liaqat Ahmad Khan, Rs.2000/-, his CNIC, service card of Kohi Noor Mill, DEAWOO ticket. He took into possession the above mentioned articles alongwith narcotics and vehicle vide recovery memo Exh.PW.3/1 in presence of witnesses, drafted murasila

Exh.PW.3/2 and sent the same to Police Station for registration of the case, consequent whereupon FIR No.1 dated 02.01.2010 under section 9 CNS, Act, 1997, was registered against the appellant in Police Station Anti Narcotics Force, Peshawar. He recorded statements of the PWs and handed over the case property to Moharrir of Police Station for safe custody and sending the samples to the FSL. He sent the registration of the motorcar to MRA concerned for verification, but did not receive any report from MRA. He through a written request sought verification of service of the appellant from Managing Director Kohi Noor Textile Mills Private Ltd, but with no response. He placed on file report of the FSL qua the samples Exh.PW.3/11. He exhibited the motorcar alongwith its key as Exh.PA, two bags

containing charas gardha Exh.P.1 and P.2, three bags containing charas Pukhta as Exh.P.3 to P.5 and opium Exh.P.6, mobile phone of the accused Exh.P.7, registration book of the vehicle as Exh.P.8, Rs.2000/- Exh.P.9, CNIC Exh.P.10, tick of DAEWOO as Exh.P.12.

3. On completion of investigation challan was submitted against the appellant before the learned trial Court, where he was formally charge sheeted, to which he pleaded not guilty and claimed trial. To prove its case prosecution examined as many as five witnesses. After closure of the prosecution evidence statement of appellant Majid Sarwar was recorded under section 342 Cr.P.C. wherein he denied the prosecution allegations and professed his innocence. He deposed that he was arrested from DAWOO bus stand while going to

Rawalpindi and implicated in the instant false case. He, however, declined to be examined on oath as his own witness under section 340 (2) Cr.P.C. or to produce evidence in defence. On conclusion of trial, learned Trial Court, after hearing both the sides, convicted and sentenced the appellant, as mentioned above, hence, this appeal.

4. Learned counsel for the appellant argued that prosecution case is a cook and bull story; that in fact, appellant had been arrested from DEAWOO Bus stand by the ANF officials and was made a scapegoat in the instant case by letting off the real culprit; that recovery of DEAWOO ticket from possession of the appellant is sufficient proof to substantiate his stance; that the case property produced before the court and exhibited does not corroborate the

quantity allegedly recovered from the vehicle of the appellant, which squarely shatters the whole structure of the prosecution case; that prosecution has miserably failed to prove the alleged recovery of narcotics through cogent and confidence inspiring evidence beyond reasonable doubt, therefore, the learned Trial Court has erred in law while recording conviction of the appellant on the basis of shaky and scanty evidence, hence, impugned judgment is liable to be reversed.

5. Conversely, learned SSP for ANF contended that appellant has been arrested red handed and huge quantity of narcotics has been recovered from secret cavities of his motorcar which was in his exclusive possession and control; that the recovery has been proved by the prosecution through cogent and confidence

inspiring evidence supported by positive FSL report; that PWs having no ill or enmity with the appellant, their testimony cannot be discarded on mere ground that they belong to ANF force; that mere variation in the quantity of narcotics recovered and produced before the court, would not damage the prosecution case as it might have misplaced in Malkhana. He contended that plantation of such huge quantity of narcotics in absence of any serious enmity of the ANF officials, does not appeal to a prudent mind, therefore, the appellant cannot be straightaway acquitted on the sole ground of variation in the quantity of narcotics and at the most he can be held guilty for the quantity produced and exhibited before the court which also exceeds 10 Kilograms, therefore, punishment awarded by the learned Trial Court, in such eventualities,

would be sufficient to meet the ends of justice.

He sought dismissal of the appeal.

6. We have considered the respective submissions advanced from both the sides and perused the record carefully.

7. It appears from the record that 30 packets chars Garhda, each weighing 01 Kilogram, total 30 Kilogram, 69 packets chars Pukhta each weighing 01 Kilogram, total 69 Kilograms and one packet opium weighing 750 grams, have been shown allegedly recovered on the pointation of the appellant from secret cavities of motorcar bearing registration No.IDM-2722. In support of proof of the aforesaid recovery, Mumtaz Hussain, the Seizing Officer appeared as PW.3 and Murtaza Khan ASI, who stood as marginal witness to the recovery memo Exh.PW.3/1, vide which the

alleged recovered narcotics had been taken into possession in his presence by the Seizing Officer, appeared as PW.4. A look over their testimony reveals that they are consistent with each other on the quantity of the recovered narcotics as alleged in initial report. They reiterated the numbers of packets of chars Gardha to be 30, Charas Pukhta to be 69 and opium to be one. During cross-examination of PW Murtaz Khan ASI, on the request of learned defence counsel, the case property was desealed, and on examination, the learned Trial Court found ***“Charas Pukhta in 23 packets instead of 69 packets and charas Gardha in 15 packets, instead of 30 packets”***. The learned Trial Court did not find any monogram of any seal or FIR number on any packet. This glaring contradiction which totally denies the quantity

of narcotics allegedly recovered from the motorcar of the appellant, goes to the very roots of the prosecution case, casting serious doubts about the credibility and truthfulness of the prosecution witnesses. No justification, much less plausible, has been furnished by the prosecution to convince our mind about the above glaring contradiction in the quantity of the narcotics, which does not tally with the one allegedly recovered from the motorcar of the appellant on his pointation. We, therefore, hold that this aspect of the case if cannot be entirely thrown out, surely cannot also be relied upon for the purpose of recording conviction in light of the principle of “***Harder the sentence, stricter the standard of proof.***” The above aspect of the case depicts that either the appellant has been implicated in a false case or that the PWs have

purposely furnished false statements concealing material facts, but it has direct bearing on the fate of the case. The learned Trial Court while recording the evidence, was very much in the know of this disturbing aspect of the prosecution case, but was probably influenced by the huge quantity involved in the case and thus extended every possible benefit to the prosecution rather than to the defence, which is against the golden principle of appreciation of evidence, according to which benefit of any circumstance creating doubt, shall be extended to the accused and not the prosecution. The rule of benefit of doubt is essentially a rule of prudence, which cannot be ignored while dispensing justice in accordance with law. In such like case, for the safe administration of justice, it is not the quantity of contraband, but the quality of evidence produced

in the court, to be considered for reaching a correct and just decision of the case. Conviction must be based on unimpeachable evidence and certainty of guilt and any doubt arising in the prosecution case, must be resolved in favour of the accused. The said rule is based on the maxim “ it is better that ten guilty persons be acquitted rather than one innocent person be convicted” which occupied a pivotal place in the Islamic Law and is enforced strictly in view of the saying of the Holy Prophet (PBUH) that the “mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent”. Wisdom in this regard can also be derived from the judgments of the apex court in case titled, **”Muhammad Khan and another Vs the State” (1999 SCMR 1220)** and case titled, **“Muhammad Ikram Vs the State” (2009 SCMR 230).**

8. For what has been discussed above, we are firm in our view that the prosecution has miserably failed to bring home the guilt of the appellant through cogent and confidence inspiring evidence. Accordingly, we by allowing this appeal and extending benefit of doubt to the appellant, set aside his conviction and sentence recorded by the learned Trial Court vide impugned judgment dated 24.03.2011, and hereby acquit him of the charge. He be set at liberty forthwith, if not required in any other case.

9. The Additional Registrar (Judicial) of this Court is directed to send copy of this judgment to the Director-General Anti Narcotics Force, for looking into the matter and taking action under the law against the delinquent officials, who tampered with the case property

and played an important role in acquittal of the accused, in an offence heinous in nature, affecting the entire society, particularly the youth, who are the future nation builders.

Announced.

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