

JUDGMENT SHEET
PESHAWAR HIGH COURT
MINGORA BENCH
(Judicial Department)

Cr.A No. 291-M/2021

Shakeel Ahmad son of Wali Muhammad (Appellant)
Versus

The State through A.A.G & another
(Respondents)

Present: *Mr. Naseem Ullah Khan, Advocate.*
Mr. Haq Nawaz, Asstt: A.G.

Cr.A No. 323-M/2021

Bilal Ahmad son of Nisar Ahmad (Appellant)
Versus

The State through A.A.G.
(Respondents)

Present: *M/S Muhammad Ishaq Shah, Muhammad Ishaq*
(Khalil), Advocates and Mr. Abdul Qayum, ASC.
Mr. Haq Nawaz, Asstt: A.G.

Date of hearing: 20.06.2022

JUDGMENT

MUHAMMAD IJAZ KHAN, J.- Through this single judgment, we intend to decide the instant criminal appeal No. 291-M of 2021 as well as the connected criminal appeal No. 323-M of 2021, as both these appeals arise out from one and the same impugned judgment of conviction and sentence dated 12.10.2021 passed by the learned Judge Special Court/Sessions Judge Malakand at Batkhela.

Ijaz

2. As per contents of FIR complainant Naik Rehman, Post Commander of Levy Post *Hassan Khan Shaheed, Alladhand* along with other levy official laid a barricade at *Alladhand* road near *Sharab Dara* when in the meanwhile they stopped a motorcar bearing No. 6432/Police coming from *Amandara* side. Driver of the car disclosed his name as Bilal Ahmad, while the person sitting in its front seat has been identified as Shakeel Ahmad. During search of the motorcar, the levy officials recovered a white colour plastic lying beneath the front seat on mate which contained five packets of Chars total weighing 6000 grams. Further search of the accused/appellant namely Bilal Ahmad led to recovery of three service cards of the Khyber Pakhtunkhwa Police Department. Both the accused were arrested on the spot and the motorcar was also taken in possession. 'Murasila' was drafted which was reduced into FIR No. 84 dated 12.09.2020 registered under section 9 (d) of The Khyber Pakhtunkhwa Control of Narcotic Substances Act 2019 (hereinafter referred to as "*The K.P.*

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CNSA Act of 2019”) at Levy Post Alladhand District Malakand.

3. The accused were summoned by the learned trial Court and charge was framed against them on 07.01.2021, to which they pleaded not guilty and claimed trial. The prosecution was invited to produce its evidence, who accordingly examined five (05) witnesses in support of their case. Thereafter, statements of accused were recorded under section 342 Cr.P.C and on conclusion of trial in the case, the accused/appellants were convicted vide the impugned order/judgment dated 12.10.2021 of the Court of learned Special Court/ Sessions Judge Malakand at Batkhela and were sentenced as follows;

“Under section 9 (d) K.P CNSA to 10 years rigorous imprisonment each along with fine of Rs. 500,000/- (five hundred thousand), or in default thereof they were ordered to undergo six months simple imprisonment. The appellants were also extended benefit of section 382-B Cr.P.C.

The appellants have now challenged the aforesaid judgment by filing the instant criminal appeals before this Court.

4. Arguments of learned counsel for the appellants as well as learned Astt: A.G. appearing on behalf of the State were heard in considerable detail and the record perused with their able assistance.

5. As per the prosecution's case information were received by the complainant namely Naik Rehman, Post Commander who appeared as PW-3 that on the day of occurrence he along with police personnel namely Mohib Gul, Shamrooz Khan, Sikandar Wahab and driver Mubarak Hussain were present at the barricade laid at *Alladhand* road near *Sharab Dara* when in the meanwhile a motorcar bearing No. 6432/Police came from *Amandara* side at 18:30 hours which was signaled to stop. Driver of the car disclosed his name as Bilal Ahmad whereas the person sitting on the front seat disclosed his name as Shakeel Ahmad. Both were de-boarded from the car and on search of the motorcar beneath the front seat on

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mate a plastic bag comprising five packets of Chars was recovered which were wrapped up in a white colour polythene bag and 10 grams sample from each packets were separated for the purpose of FSL through knife and these samples were sealed in parcels No. 1 to 5 whereas the remaining stuff was sealed in parcel No. 6 and the same were affixed with the monogram of "M.T". On further search of the appellant namely Bilal Ahmad three service cards of the Police Department were recovered from his side pocket and the same were sealed in parcel No. 07 and thereafter both the accused were arrested and only the '*Murasila*' was sent to the police station through the driver namely Mubarak Hussain for registration of the FIR.

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6. First of all this Court will determine that as to whether on the available evidence prosecution has been able to establish

the conscious knowledge of either of the appellants or of both of the appellants jointly.

As stated in the 'Murasila' that recovery of alleged contraband was made from

beneath the left side of the front seat on mate

“بائیں طرف فرنٹ سیٹ کے نیچے میٹ پر” so, this

possibility cannot be excluded that the same

may be kept by co-appellant who was front-

seater namely Shakeel Ahmad and the appellant

namely Bilal Ahmad was not in the knowledge

of the same and this possibility is equally

applicable to the case of appellant namely

Shakeel as the packets of Chars may be kept by

Bilal Ahmad and the co-appellant Shakeel was

not in the knowledge. So when once both

possibilities could not be excluded then the

prosecution was bound to prove the conscious

knowledge of either of the appellants or of both

the appellants jointly but the prosecution has

not been able to discharge their burden. In the

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case of "Muhammad Noor & others v/s The State" reported as 2010 SCMR 927, the Hon'ble Apex Court has held that it is permissible to look into the object of the legislature and find out whether, as a matter of fact, the legislature intended anything to be proved except possession of the article as constituting the element of the offence. Even if it is assumed that the offence is absolute, the word "Possess" appearing in the section 6 connotes some sort of knowledge about the things possessed. So we have to determine what is meant by word "possess" in the section. It is necessary to show that the accused had the article, which turned out to be narcotic drugs. In other words the prosecution must prove that the accused was knowingly in control of something in the circumstances, which showed that he was assenting to being in control of it. It is not necessary to show in fact that he had actual

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knowledge of that which he had. In the case of "Shahzada v/s The State" reported as 2010 SCMR 841 it was also held by the Apex Court that no such evidence has been led by the prosecution to prove the above aspects of the case so as to make the appellants responsible for the commission of the crime along with the Driver. If the property would have been lying open within the view of the appellants or they knew the placement of the property then the situation would have been different. In such a situation, the appellants were required to explain their position, as required under Article 122 of Qanun-e-Shahadat Order, 1984 and without such explanation their involvement in the case would have been proved. As the property was not within their view and they had no knowledge of the placement of the property, therefore, they cannot be held responsible and in joint possession of the property with the

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Driver. In another case the august Supreme Court of Pakistan reported as 1997 SCMR 345 in such like situation, the other fellow of the truck driver sitting with him has been absolved of the charge in view of the possibility that he might had no, knowledge of the presence of heroin in the truck.

7. Secondly this Court will determine that as to whether on the available evidence the prosecution has been able to establish the safe transmission and safe custody of the samples and remaining stuff from the spot to the police station. It may be noted that in the '*Murasila*' it has not been specifically mentioned that the seizing officer namely Naik Rehman who appeared as PW-3 has handed over the parcels of samples to PW Mubarak Hussain for their transmission to the police station and the same remained a mystery till date that as to whether the seizing officer has ever handed over the

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samples to Mubarak Hussain or not and as to whether the seizing officer has retained these samples with himself or not as the said Mubarak Hussain has not been produced by the prosecution in the Court who was the most relevant and natural witness to answer these questions, and as such because of his non-production the prosecution has itself created these lacunas in its case, which goes deep into the roots of the prosecution case.

8. Similarly, the seizing officer namely Naik Rehman who appeared in the Court as PW-3 has also not uttered a single word that as to whom he has handed over the samples and his whole statement is completely mum regarding handing over of the samples to PW Mubarak Hussain or even to the *Muharir* of the police station namely Zakir Hussain. In this view of the matter, the seizing officer and other police personnel who were present on the spot

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have not been able to establish on record that as to how they have made the transmission of the samples and the remaining stuff from the spot to the *Mall Khana* of police station.

9. The separation of the samples by the seizing officer namely Naik Rehman also become doubtful as under the Rules the abbreviation of the name of the seizing officer is to be the monogram on the parcels of the samples, which in the present case should have been "N.R" i.e. Naik Rehman, however, the parcels which were received in the laboratory are bearing the monogram "M.T." which is the abbreviation of name of Muhammad Tufail who happened to be the Investigating Officer of this case and who appeared as PW-5, however, he in his Court statement has never stated that he separated the samples from the recovered stuff and inscribed the monogram on the parcels as "M.T" and rightly so as per the prosecution

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case it was the seizing officer namely Naik Rehman who separated the samples. In this view of the matter, the separation of the samples from the recovered stuff by the seizing officer namely Naik Rehman appears to be not a true statement specially when he in his court statement has categorically mentioned that he was present on the spot, when Muhammad Tufail reached there and on his directions he started the investigation, so, in such state of affairs the prosecution has not been able to establish on record that as to who has separated the samples from the recovered contraband leaving behind many doubts of their safety qua their transmission and custody.

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10. In narcotic cases it is the duty of prosecution to establish the seizure of contraband, taking of samples from the recovered stuff, their safe transmission from the spot to the police station and from police station

to the F.S.L and the safe custody of remaining contraband, however, as stated above that in the present case Mubarak Hussain who brought the '*Murasila*' from the spot to the police station was not produced before the Court whereas the seizing officer namely Naik Rehman (PW-3) in his examination-in-chief has not uttered a single word that as to whom he handed over the parcels of separated samples of contraband and as such the unbroken chain has not been established by the prosecution. This silence assume more significance when it is seen that the alleged parcels are not bearing the monogram of abbreviation of the seizing officer ("N.R") rather it bears the abbreviation of name of Investigating Officer i.e. Muhammad Tufail ("M.T") and as such the prosecution has not been able to prove that as to who separated the samples from the recovered stuff and that as to who has dispatched or taken them to the police



station, which failure of the prosecution is fatal for their case. In the case of "Qaiser Khan v/s The State" reported as 2021 SCMR 363, the Hon'ble Apex Court has held that the record shows that there is nothing on the record to establish that to whom the alleged recovered narcotics were handed over in the police station for safe custody. The Forensic Report reflects that the alleged narcotics were received in the laboratory on 11th December, 2012 but evidence on the record is silent that where the same remained for two days i.e. from 9th December, 2012 to 11th December, 2012. Similarly evidence regarding safe transmission of alleged recovered narcotics to the laboratory for chemical analysis is also missing. The law in this regard is settled by now that if safe custody of narcotics and its transmission through safe hands is not



established on the record, same cannot be used against the accused. Similarly, the Hon'ble Apex Court in the case of "Zubair Khan v/s The State" reported as 2021 SCMR 492 has also held that prosecution produced two witnesses, namely, Basharat Hussain, Inspector as (PW-1) and Abdul Ghani as (PW-2); the former furnished comprehensive details regarding interception of vehicle along with the contraband and investigative steps taken thereafter whereas the former corroborated his deposition, however, the prosecution unredeemably failed to establish the essential link of safe transmission of samples to the office of Chemical Examiner as despite opportunity Abdul Hakeem, EC/B-131 who had delivered the samples failed to enter the witness box, leaving the entire case in the lurch. Same view has also been reiterated by the Hon'ble Apex Court in the case of "Abdul

Ghani & others v/s The State & others

reported as 2019 SCMR 608 by holding that it is not denied that Ali Sher, H.C. who had delivered the samples of the recovered substance at the office of the Chemical Examiner had also not been produced during the trial so as to confirm safe transmission of the samples of the recovered substance.

11. In this case, admittedly as the seizing officer was Naik Rehman, therefore, the parcels bearing the samples should have been carrying the monogram of his name i.e. "N.R.", however, the same were inscribed with "M.T" which is the abbreviation of the name of the Investigating Officer Muhammad Tufail and thus this very fact by itself doubted and destroyed the whole prosecution case right from its inception as it has never been the case of prosecution that Muhammad Tufail has separated the samples and sealed them in



parcels. Such flaw was found fatal by the Hon'ble Apex Court in the case "Khtar Iqbal v/s The State" reported as 2015 SCMR 291 by observing that the most important factor in that connection, which compounded all those doubts and raised a big question mark upon the veracity of the prosecution's case against the appellant, was that after allegedly recovering the contraband substance from the boot of the motorcar driven by the appellant the parcels of the recovered substance were sealed with a monogram reading as SJ and it had been disclosed by Mati-ur-Rehman (P.W.2) before the learned trial Court that the said monogram belonged to one Sameen Jan Inspector who was not even posted at the relevant Police Station at the time of the alleged recovery from the appellant and as a matter of fact at the said time the said Inspector was serving at a Police Station in Quetta. Mati-ur-Rehman (P.W.2) had

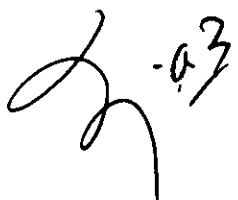


not been able to advance any explanation whatsoever as to why the recovery officer namely Assistant Director Rehmat had not put his own monogram on the seals of the parcels prepared by him and as to why he had used the monogram of some other officer who was not even posted at the relevant Police Station at the relevant time. Similarly, this Court in the case of "Usman Shah v/s The State" reported as 2022 YLR 821 has also reiterated the same stance by holding that the seizing officer while appearing before the Court as PW-2, deposed in his Court's statement that after recovery of contraband, he separated samples for FSL purpose and sealed in parcels Nos.1 to 8 and remaining stuff in parcel No.9 with a monogram of "MK" which, he categorically admitted that same is not pertained to his name and in-fact the same stands for Mukhtiar Khan, S.I., who was stated to be present with the

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complainant. The alleged recovery seems to be doubtful, rather hints at something to be planted by complainant, because said Mukhtiar Khan SI was never cited as a witness during proceedings in the instant case. This witness, after few moments, in his cross-examination contradicted his own statement by deposing that "Mukhtiar Khan S.I. was present in the P.S. at that very time. The MK monogram was lying with me in the official van". Be that as it may, the Seizing Officer, pursuant to spy information, should have been required to have his own monogram with the letters "RK" in his possession to have strengthened and substantiated his version, but he disrupted the episode in a casual manner.

12. As in the present case the Investigating Officer was Muhammad Tufail, who was IHC (Incharge-Head-Constable) was not an "authorized officer" within the meaning

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of section 2 (e) of The K.P. CNSA Act which is reproduced below;-

Authorized Officer means,-

- (i) *an officer of the Directorate General, not below the rank of [Inspector], authorized by the Director; or*
- (ii) *(ii) a Police officer/official not below the rank of Sub-Inspector, authorized by the Regional Police Officer*

The aforesaid definition of the “authorized officer” states that any officer of the Directorate General not below the rank of Inspector who is duly authorized by the Director or a police officer/official not below the rank of Sub-Inspector, who is duly authorized by the Regional Police Officer. In the present case section 2 (e) (ii) would be applicable, however, on record there is no authorization of Regional Police Officer in favour of Muhammad Tufail, IHC is available on file so as to term him as an “authorized officer” within the meaning of section 2 (e) (ii) of The K.P. CNSA Act 2019 and as such the

investigation conducted by him lacks statutory backing and sanctity.

13. It is also settled law that for giving benefit to an accused, it is not essential that there should be many grounds for the same, even a single doubt is sufficient to extend its benefit to an accused person as it is the cardinal principle of criminal administration of justice that let hundred guilty persons be acquitted but one innocent person should not be convicted. In the case of "Muhammad Mansha v/s The State" reported as 2018 SCMR 772, the Hon'ble Apex Court has held that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty

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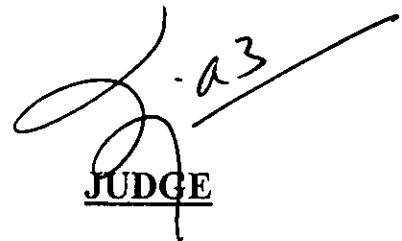
persons be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made upon the cases of Tariq Pervez v. The State (1995 SCMR 1345), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), and Muhammad Zaman v. The State (2014 SCMR 749). In the case of "Muhammad Akram v/s The State" reported as 2009 SCMR 230, the Hon'ble Apex Court has held that it is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. In the case of "Tariq Pervaiz v/s The State" reported as 1995 SCMR 1345, the Hon'ble Apex Court has held that the concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right.

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14. For what has been discussed above, this Court is of the firm view that the prosecution has failed to prove its case against both the accused/appellants beyond reasonable doubt; therefore, their conviction cannot be maintained. Resultantly, while extending them the benefit of the doubt, both these connected criminal appeal bearing No. 291-M and 323-M of 2021 are allowed and the impugned order/judgment of conviction and sentence dated 12.10.2021 recorded by the learned trial Court is set aside and consequently the appellants namely Shakeel Ahmad and Bilal Ahmad are acquitted of the charges levelled against them. They be released forthwith from the Jail, if not required in any other case.

15. These are reasons for my short orders of even date.

Announced
Dt. 20.06.2022

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JUDGE

Office
06/07/2022
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