Judgment Sheet

IN THE PESHAWAR HIGH COURT, PESHAWAR

Judicial Department

Cr.A No. 900-P/2019
Usman Shah Vs State

Date of hearing: 12.11.2019.

Appellant by: Mr. Amjad Noor Khan, Advocate.

State by: Mr. Umar Farooq, AAG.

JUDGMENT

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AHMAD ALI, J. Through the appeal in hand, the appellant (Usman Shah s/o Samar Gul) has questioned the judgment of the learned Additional Sessions Judge-IX/Judge, Special Court, Peshawar dated 09.07.2019, delivered in case FIR No.471 dated 09.05.2015 under section 9-C CNSA, Police Station, Chamkani (Peshawar), whereby he was convicted and sentenced to imprisonment for six years with fine of Rs.100, 000/- (one lac) or in default whereof to suffer 6 months S.I with benefit under section 382-B Cr.P.C extended.

2. Brief facts of the case, as per prosecution's version, are that the complainant Riaz Khan SI, having received information regarding smuggling of huge quantity of narcotics from tribal territory to Punjab, through motorcar bearing registration No.N-4673/Karachi, laid Nakabandi. In the meanwhile, the car in question arrived, which was stopped. Same was driven by the present appellant. Search of the vehicle led to the recovery of 8 kgs charas contained in 8 packets. 5/5 gram from each packet were separated for chemical analysis by FSL and sealed into parcel No.1 to8 whereas the remaining contraband was sealed in another parcel No.9 with a monogram of 'MK' affixed thereon. On the basis of Murasila, the instant FIR was lodged against the accused.

3. On completion of investigation, complete challan against the present accused-appellant was submitted in Court where he was charge-sheeted, however, he pleaded not guilty and claimed trial. The prosecution in order to prove its case, produced and examined as many as six witnesses whereafter statement of the accused was recorded, wherein, he professed his innocence.

4. The learned Trial Court, after conclusion of trial, found the appellant guilty of the charge and, while recording his conviction, sentenced him as mentioned above. Feeling aggrieved, the appellant has filed the instant appeal before this Court.

5. Arguments heard and record gone through.

6. Allegation against the appellant is that, 8 kgs charas were recovered from the motorcar driven by him. To reach a right conclusion, the testimony of witnesses is very necessary to be thoroughly scrutinized.

7. 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 No.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, SI, who was stated to be present with the 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. **Reliance could be placed on 2015 SCMR 291**.

8. This witness, after few moments, in his cross examination contradicted his own statement by deposing that "***Mukhtiar Khan SI was present in the PS 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. This witness further deposed that;

> **"Wali Khan ASI is the IO in the instant case. The IO came to the spot but I have nothing handed over on the spot. The witness volunteered that I myself brought the accused along with the case property to the PS and handed over to the Moharrir of the PS at about 16:40 hours".**

From the above statement of PW-2, though it transpires that he handed over the case property to the Moharrir of the PS, but, said Moharrir was not produced before the Court so as to support the version of the complainant and to have to depose about the safe custody of the case property. The prosecution even did not produce the Register No.19

of the PS so as to prove that the case property was ever kept in Malkhana of the PS. In this way, the prosecution, has wasted the best evidence available with it to have been established the safe custody of recovered contraband. It is also on record that one of the PW, namely, Shah Khalid constable, who was the 2nd marginal witness to the recovery memo was abandoned by the prosecution for reasons best known to them. So, in the situation, not only adverse inference under Article 129(g) of Qanun-e-Shahadat Order 1984 can be safely drawn, but the legal inference could also be drawn that if the said witnesses had entered into the witness box then they would not have supported the prosecution case. In this regard wisdom can be safely derived from case law reported in **NLR 2015 SCJ 121 & PLD 2016 SC 17.**

9. Witness to the recovery memo is PW-3 (Salman Khan No.1709), but even this witness has not stated anything about the samples and remaining contraband as to whether the complainant after seizure of the said contraband had handed over the same to someone else or otherwise. PW-4 is Ghulam

Hiader SI, he stated in his examination in chief as under:-

> **"On receiving the murasila from the complainant Riaz Khan SI through Constable Sulaiman No.1709. I incorporated its contents of the murasila into shape of FIR Ex.PA. …..**
> **XXX….Nil (opportunity given)"**

This witness has also brought nothing on record regarding receipt of any case property along with murasila.

10. Besides, PW-2 though stated in his examination in chief that he sent the samples (sealed parcels No. 1 to 8) to FSL vide application Ex.PW2/2, but there is no name/number of official mentioned therein. It was the FSL report (Ex.PF) which disclosed that the samples were sent to FSL on 12.05.2015 through FC Wali 4336, but to our utter surprise, no such official was produced before the learned Trial Court to ascertain that when and through whom he was handed over the said samples for taking the same to FSL.

11. Record further reveals that the contraband was recovered on 09.05.2015 whereas the samples were received in FSL on 12.05.2015 with a considerable delay of about three days. The prosecution could not offer any plausible explanation for such delay.

Reliance is placed on case titled ***"Ikramullah and others Vs the State reported in 2015 SCMR 1002"*** wherein the Apex Court has held that;

> **"No such police official was produced before Trial Court to depose about safe custody of samples entrusted to him for being deposited in office of Chemical Examiner---Prosecution was not able to establish that after alleged recovery of substance so recovered was either kept in safe custody or that samples were taken from recovered substance had safely been transmitted to office of Chemical Examiner without the same being tampered with or replaced while in transit---Prosecution failed to prove its case against accused persons beyond reasonable doubt"**.

12. Thus, prosecution has not only miserably failed to establish the safe custody of the case property, but also failed to prove the safe transmission of the samples to FSL. In a case where safe custody of the recovered substance or safe transmission of samples of the recovered substance was not proved by the prosecution through independent evidence, it could not be concluded that the prosecution had succeeded in establishing its case against the accused beyond reasonable doubt. Wisdom can be derived from the case law reported in **2019 SCMR 608**.

13. Apart from the above, the vehicle, from which the alleged recovery was effected, was not produced before the Court and was not exhibited during trial.

The case property had not been produced by the police before the trial court without any justification, which shows that the police had malice towards the accused regarding recovery of the contraband. Its production before the court was the primary duty of the police in order to bring home the guilt of the accused. Non-production of the case property was fatal to the prosecution's case, and the same had destroyed the very foundation of the case, which created a dent in the prosecution case causing serious doubt with regard to the occurrence. Reference is made to case law reported in **2017 P.Cr.L.J 14**.

14. There is other glaring point in the instant case that whole the proceedings were conducted by PW-6 (Wali Khan ASI) in violation of the provision of section 21 of the CNSA, 1997 despite the fact that, according to the statement of PW-6, there were two other police official in the rank of SI were posted in Investigation Wing of said police station. Such conduct of the prosecution, while dealing with a heinous case, caused considerable loss to its case because neither any site plan nor any card of arrest was prepared. Had it been, same would have been

found on file to support the prosecution story. In a case reported in **2018 SCMR 2039**, the august Supreme Court of Pakistan has held that;

> **"To distinguish where the directions of the legislature were imperative and where they were directory, the real question was whether a thing had been ordered by the legislature to be done and what was the consequence, if it was not done. Some rules are vital and went to the root of the matter, they could not be broken; others were only directory and a breach of them could be overlooked provided there was substantial compliance. Duty of the court was to try to unravel the real intention of the legislature. Such exercise entailed carefully attending to the scheme of the Act and then highlighting the provisions that actually embodied the real purpose and object of the Act. Provision in a statute was mandatory if the omission to follow it rendered the proceedings to which it related illegal and void, while a provision was directory if its observance was not necessary to the validity of the proceedings. Some parts of a statute, thus, may be mandatory whilst others may be directory. Furthermore certain portion of a provision, obligating something to be done, may be mandatory in nature whilst another part of the same provision, may be directory, owing to the guiding legislative intent behind it. Even parts of a single provision or rule may be mandatory or directory. In another context, whether a statute or rule be termed mandatory or directory would depend upon larger public interest, nicely balanced with the precious right of the common man."**

It was also astonishing that IO of the case disclosed that whole the proceedings were carried out inside the police station, which suggests that the witnesses produced by the prosecution were either not present on the spot or they were not narrating the actual truth about the occurrence

15. As, the prosecution has not only failed to establish any connection of appellant with vehicle in question but has also brought nothing on record in respect of any nexus of the appellant with the alleged

contraband, therefore, he cannot be held responsible for the same. It seems that the prosecution, for saving the neck of actual culprit, has falsely dragged the present appellant in the instant case.

16. Keeping in view the contradictions on material points occurred in the statements of PWs and handling of the contraband as hinted above created doubts in the prosecution case qua its recovery and safe custody, which suggests that occurrence has not taken place in the mode and manner as alleged by the prosecution.

17. The above discussion has led this Court to believe that the learned trial court has erred in appreciating the case evidence in its true perspective. It has been held, time and again by the superior courts, that a slightest doubt occurs in the prosecution case is sufficient to acquit an accused. For extending the benefit of doubt, it is not necessary that there should be many circumstances creating doubts. Single circumstance, creating reasonable doubt in the prudent mind about the guilt of accused, makes him entitled to its benefit, not as a matter of grace or concession, but as a matter of right. Reliance could be placed on **2009 SCMR 230,**

2011 SCMR 664, 2011 SCMR 646, 1984 PLD SC 433, 2012 MLD 1358, 2007 SCMR 1825, 2008 P.Cr.L.J 376, 1994 PLD Peshawar 114, 2012 PLD Peshawar 01, 1999 P.Cr.L.J 1087, 1997 SCMR 449, 2011 SCMR 820 & 2006 P.Cr.L.J SC 1002.

The conclusions drawn by the learned trial Court are not borne out of the case evidence, therefore, the impugned judgment is not sustainable.

18. For what has been discussed above and while extending benefit of doubt to the appellant, instant appeal is allowed, the impugned judgment is set aside and he is acquitted of the charge levelled against him. He be set at liberty forthwith, if not required to be detained in any other case.

19. Above are the reasons of short order of even date.

Announced
12.11.2019

CHIEF JUSTICE

J U D G E

*Amjad Ali, PS, DB of Hon'ble Mr. Justice Waqar Ahmad Seth, CJ & Hon'ble Mr. Justice Ahmad Ali