Judgment Sheet
PESHAWAR HIGH COURT, BANNU BENCH.

JUDICIAL DEPARTMENT
Cr. A No.73-B/2021.

Muhammad Raziq & another

Vs

The State.

JUDGMENT

Date of hearing.....04.6.2024.....

For appellant(s)... Mr. Khush Amir Khan Khattak, Advocate.

For State: Mr. Muhammad Asghar Khan Ahmadzai, AAG.

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KAMRAN HAYAT MIANKHEL, J:- Muhammad Raziq son of Ashraf Khan and Mst. Zarshad alias Yasmin wife of Wazir, appellants, were tried by the learned Judge Special Court/Additional Sessions Judge, Banda Daud Shah, District Karak for the offence under section 9(C) of the Control of Narcotic Substances Act, 1997 registered at Police Station Terri, District Karak and after conclusion of trial, the learned trail Court while holding the appellants guilty of the offence, convicted them under section 9 (C) CNSA and sentenced to suffer 03 years rigorous imprisonment and a fine of Rs.1,00,000/- each, or in

default of payment of fine, they shall further undergo simple imprisonment for six months. Benefit of section 382-B Cr.P.C was also given to the convicts/appellants vide judgment dated 26.3.2021.

2. On 30.01.2018, at about 16:40 hours, Saif Ullah Khan, SHO of Police Station Terri, along with other police officials, including lady constable Hazrat Zubaida, acted upon special directives from Circle SDPO, made barricade at the spot. While carrying out this duty, they intercepted a Suzuki vehicle bearing registration No. B-7785/Kohat traveling from the Terrir side. Upon inspection, it was discovered that a lady was seated in the front of the vehicle, with a minor girl on her lap. Additionally, the lady had a black coloured purse lying on her thighs. A thorough search, conducted by a lady constable, led to the recovery of two packets of charas Garda wrapped in yellow plastic. These packets were weighed using a digital scale, one packet weighing 1010 grams and the other 950 grams, totaling 1960 grams. From this total, 5/5 grams of charas was separated from each packet for forensic examination and sealed in parcels No. 1 and 2, while the remaining 1950 grams was sealed in parcel No. 3. Further search of the vehicle revealed

another packet of charas Garda, weighing 1400 grams, concealed underneath the driver's seat. Similar to the previous recovery, 5 grams of charas was separated for forensic analysis and sealed in parcel No. 4, while the remaining charas was sealed in parcel No. 5. The female accused identified herself as Mst. Zarshad alias Yasmina, and the minor girl accompanying her was identified as Sherin Bibi, aged about 2 to 3 years. The male accused, occupying the driver's seat, disclosed his name as Muhammad Raziq. Subsequently, the SHO drafted 'Murasila' and forwarded it to the Police Station for the registration of a case against the appellants. The accused were promptly arrested at the scene, leading to the registration of the case under FIR No. 54, dated 30.01. 2018, under Section 9(C) of the CNSA, 2019, at Police Station Terri, District Karak

3. After completion of investigation, complete challan was submitted against the accused/appellants. They were summoned and on appearance after compliance of provisions under section 265-K Cr.P.C, formal charge was framed against the appellants, to which they pleaded not guilty and claimed trial. The prosecution, in order to prove its

case against the appellants, produced lady constable Hazrat Zubaida as PW-1, who is marginal witness to the recovery memo Ex.PC, Sher Zaman ASI as PW-2, who incorporated the contents of murasila into FIR. PW-3 Shad Akbar OII has conducted investigation in the case, PW-4 is Complainant Siaf Ullah SHO, who narrated the same facts as mentioned in the FIR and also stated that at 18:10 hours the investigation officer arrived to the spot who prepared the site plan on his pointation. The I.O took the snap shot of both the accused along with the contraband and Suzuki van. He recorded his statement under section 161 Cr.P.C. He had shown the recovered contraband to the I.O on the spot. Later on he handed over the case property and the accused to Muharrir of the police station at about 19:30 hours. PW-5 is the statement of Nadeem Ullah No.667, who took the murasila from the spot to the police station Terrir and handed over it to Sher Zaman Khan ASI.

4. After close of prosecution case, statement of appellants were recorded under section 342 Cr.P.C, wherein, they pleaded innocence and false implication, however, neither opted to appear as their own witness on oath or to produce evidence in their

defence. The learned trail Court, after hearing the arguments of the learned counsel for the appellants and learned APP appearing on behalf of the State convicted and sentenced the appellants as noted above. Hence, this appeal.

5. The prosecution in order to prove its case produced Sher Zaman ASI, who incorporated the contents of murasila into FIR. During cross-examinations he admitted that complainant Saif Ullah was on leave on that very day. The complainant stated in his examination in chief that he had shown the recovered contraband to the I.O on the spot. Later on he handed over the case property and the accused to Muharrir of the police station at about 19:30 hours, however the investigation officer/PW-3 contrary to the statement of the complainant stated in his cross-examination that the case property mentioned above was handed over to the Muharrir of the police station by him. It is also admitted fact that the prosecution has not produced register No. 19 of malkhana, Police Station Terri District Karak, to prove that the allegedly recovered contraband charas was deposited in the Malkhan of the police station on the same day by the complainant. Even Saif Ullah

Khan, SHO/complainant (PW-4) had not produced abstract of register No.19 whereupon (PW-4) got his signature for receiving of case property to substantiate his plea. Under the said circumstance it can safely be held that there is no iota of evidence to establish that the alleged recovered contraband was under the safe custody. Record further reflects that important witnesses of the prosecution i.e., carrier of the sample of contraband to the FSL and Moharrir of the police station were not examined by the prosecution to prove that the case property was in safe custody till its transmission to the FSL, hence, none production of the said material witnesses cast serious doubt on the prosecution case. The withholding of this important evidence in the peculiar circumstances of this case led us to draw an adverse inference against the prosecution keeping in view Article 129(g) of Qanun-e-Shahadat Order, 1984. The prosecution has failed to explain that why the best evidence available with the prosecution in shape of statements of above said witnesses has been withheld. The said fact when confronted with learned AAG, he failed to furnish any explanation regarding such lapses of the

prosecution. After perusal of evidence on record, I find that the prosecution has not established safe custody of contraband to the police station as well as safe transmission of sample parcel drawn from recovered substance to the office of chemical analysis. It is by now trite law that the prosecution is obliged to establish that the chain of custody of the case property as well as the sample separated therefrom remained unbroken, unsuspicious, indubitable, safe and secure and any break in the chain of custody or lapse in the control of possession of the sample, will cast doubts on the safe custody and safe transmission of the sample and will impair and vitiate the reliability of the Report of the Government Analyst. In this case, the elements of doubt surrounding the prosecution case, as discussed above, has led this court to hold that the prosecution has failed to prove the case beyond reasonable doubt to sustain the conviction. The prosecution has not been able to establish that after the alleged recovery the substance so recovered was either kept in safe custody or that the sample taken from the recovered substance had safely been transmitted to the office of laboratory without being

tampered with or replaced while in transit. Reliance can safely be placed on the case titled ***"Said Wazir and another Vs. The State and others"*** reported in (2023 SCMR 1144), wherein the apex Court has held that:-

> "Heard and perused the record. It has been observed by us that recovery was effected on 09.06.2016 whereas sample parcels were received in the office of chemical examiner on 13.06.2016 without any plausible explanation as to where remain these sample parcels from 09.06.2016 to 13.06.2016. The safe custody and safe transmission of the sealed sample parcels has also not been established by the prosecution as Moharrar, who kept the sample parcel in the Malkhana and the concerned Constable (FC No. 1374), who delivered the sample parcel to the office of Forensic Science Laboratory, were not produced by the prosecution. Even the prosecution failed to prove the ownership of the vehicle. This court in the cases of Qaiser Khan v. The State through Advocate General, Khyber Pakhtunkhwa, Peshawar (2021 SCMR 363), Mst. Razia Sultana v. The State and another (2019 SCMR 1300), The State through Regional Director ANF v. Imam Bakhsh and others (2018 SCMR 2039), Ikramullah and others v. The State (2015 SCMR 1002) and Amjad Ali v. The State (2012 SCMR 577) has held that

in a case containing the above mentioned defect on the part of the prosecution, it cannot be held with any degree of certainty that the prosecution had succeeded in establishing its case against an accused person beyond any reasonable doubt."

Similarly, in Criminal Appeal No. 184 to 2020 decided on 06th January 2021 reported as **2021 SCMR 451,** which held as under;

"The chain of custody or safe custody and safe transmission of narcotic drug begins with seizure of the narcotic drug by the law enforcement officer, followed by reparation of representative samples of the seized narcotic drug, storage of the representative samples and the narcotics drug with the law enforcement agency and then dispatch of the representative samples of the narcotics drugs to the office chemical examination for examination and testing. This chain of custody must be safe and secure. This is because, the report of the chemical examination enjoys critical importance under CNSA and the chain of custody ensure that correct representative samples reach the office of the chemical examiner. Any break or gap in the chain of custody i.e. in the safe custody or safe transmission of the narcotic drug or its representative samples makes the report of the chemical examiner unsafe and unreliable for justifying conviction of the accused. The prosecution, therefore, has to establish that the

chain of custody has been unbroken and is safe, secure and indisputable on the report of chemical examiner".

6. Further reliance is placed on the case of **Imam Baksh's case (2018 SCMR 2039), Zubair** Khan **V. The State (2021 SCMR 492), Mst Razia Sulana V. The State (2019 SCMR 1300).**

7. Moreover, the FSL report, marked as Ex.PW3/8, relied upon by the prosecution also does not contain the full details of protocols of the test applied for, which being unreliable cannot be made a basis to sustain conviction and sentence of the appellants. Now it has been declared by the august apex court that "Protocol" means an explicit, detailed plan of an experiment, procedure or test or a precise step-by-step description of a test, including the listing of all necessary reagents and all criteria and procedures for the evaluation of the test data. Rule 6 requires that full protocols of the test applied be part of the Report of the Government Analyst. Every test has its protocols, which are internationally recognized and a test without the observance of its protocols has no sanctity. "Full Protocols" include description of each and every

step employed by the Government Analyst through the course of conducting a test. Hence, the Report under Rule 6 must specify every test applied for the determination of the seized substances with the full protocols adopted to conduct such tests and non-compliance of Rule 6 can frustrate the purpose and object of the Act, i.e., control of production, processing and trafficking of narcotic drugs and psychotropic substances, as conviction cannot be sustained on a Report that is inconclusive or unreliable. The evidentiary assumption attached to a Report of the Government Analyst under section 36(2) of the Act underlines the statutory significance of the Report, therefore details of the test and analysis in the shape of the protocols applied for the test become fundamental and go to the root of the statutory scheme. Rule 6 is therefore, in the public interest and safeguards the rights of the parties. Any Report (Form-II) failing to-give details of full protocols of the test applied will be inconclusive, unreliable, suspicious and untrustworthy and will not meet the evidentiary assumption attached to a Report of the Government Analyst under section 36(2). Reliance is placed on

case titled *Khair-ul-Bashar Vs. The State*, reported in **2019 SCMR 930** and **Qaiser Javed Khan Vs. The State through Prosecutor General Punjab, Lahore and another,** reported in **PLD 2020 SC 57** wherein it has been held that:-

> "6. The Report of the Government Analyst in this case specifies only the tests applied and not the protocols thereof. The term "protocol" has not been defined in the Rules. Its dictionary meaning is: "A plan of scientific experiment or other procedure.[4]" It is also referred to as "the precise method for carrying out or reproducing a given experiment[5]." These definitions are in line with the elaboration of the term "protocol" given in Imam Bakhsh wherein the Court stated the expression "protocol" to mean an explicit plan of an experiment, procedure or test. It is clarified that "protocol" is, therefore, a recognized standard method or plan for carrying out the test applied to ascertain the nature of the substance under examination. No test can take place without a protocol. The Report of the Government Analyst must show that the test applied was in accordance with a recognized standard protocol. Any test conducted without a protocol loses its reliability and evidentiary value. Therefore, to serve the purposes of the Act and the Rules, the Report of the Government Analyst must contain (i) the tests applied (ii) the protocols applied to carry out these tests (iii) the result of the test(s).

8. 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 reasonable doubt found 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, PLD 1984 SC 433, 2012 MLD 1358, 2007 SCMR 1825, 2008 PCr.LJ 376, PLD 1994 Peshawar 114, PLD 2012 Peshawar 01, 1999 PCr.LJ 1087, 1997 SCMR 449, 2011 SCMR 820 and 2006 PCr.LJ SC 1002(sic)**. The conclusions drawn by the learned trial Court are not borne out of the case evidence, therefore, the impugned judgment is not sustainable.

9. For what has been discussed above, I hold that prosecution have not been able to prove their case beyond reasonable doubts, therefore, the impugned judgment warrants interference. As such this appeal is allowed and the appellants are acquitted of the charges leveled against them by extending them

benefit of doubt. They are in jail. Hence, they be released forthwith, if not required in any other case

These are the detailed reasons of my short order of even date.

Announced.
04.6.2024
Ihsan.

JUDGE.

(S.B) Hon'ble Mr. Justice Kamran Hayat Miankhel

14/6/2024

SCANNED
14 JUN 2024
Khalid Khan