

**IN THE PESHAWAR HIGH COURT,**  
**PESHAWAR**  
 [JUDICIAL DEPARTMENT]

**Cr. Appeal No. 913-P/2020**

**PRESENT:**

For the Appellant:- Mr. Rab Nawaz Khan,  
AAG.

For respondent: Nemo.

Date of hearing. **14.12.2020**

**J U D G M E N T**

**MUHAMMAD NAEEM ANWAR, J.-** Fawad Ali SI (PW-2)

along with other police contingent was present on main road, near Asota Lar in connection with ‘nakabandi’ when at 15.30 hours, an adolescent coming on foot was stopped on the basis of suspicion. During his body search, the police recovered from him three packets chars, total 3045 grams, fastened with his body. Five grams chars from each of the packet was separated for chemical analysis and sealed into parcels No. 1 to 3, while the remaining stuff was sealed into separate parcel No.4. The pedestrian disclosed his name as Gul Zaman, the respondent. He was arrested on the spot. Murasilla in this respect was written, marked as Exh.PA/1, and sent it to Police Station, Parmoli, through Aqil constable, where on the basis of which a case FIR No. 331, dated 14.11.2017, under section 9 (c) CNSA, was registered at Police Station, Parmoli, marked as Exh.PA.

2. After registration of the case, investigation was entrusted to Shahzad Khan, SI, who on receipt of copy of FIR, visited the spot and prepared the site plan, Exh.PB. He

also recorded statements of the PWs under section 161 Cr.P.C. After completion of the investigation, complete challan was submitted before the court of learned Sessions Judge/Judge, Model Criminal Trial Court, Swabi, for trial.

3. On summoning, the accused appeared before the trial court. He was provided copies of the relevant documents within the meaning of section 265 (c) Cr.P.C. He was, accordingly, charge sheeted to which he pleaded not guilty and opted to face the trial.

4. On commencement of the trial, the prosecution produced Shah Nawaz Khan SI, who was present with the Seizing Officer at the time of recovery and his statement was recorded as PW-1. The Seizing Officer Fawad Ali was examined as PW-2 while Shahzad Khan SI, who had investigated the case, was examined as PW-3, and, thereafter, the learned DPP appearing on behalf of the State closed the prosecution evidence.

5. On conclusion of the prosecution evidence, the accused was examined under section 342 Cr.P.C. He in his statement deposed that he is innocent and has falsely been involved in the case, however, he was neither ready to be examined on oath nor wished to produce evidence in his defence within the meaning of section 340(2) Cr.P.C. Learned trial Court, after hearing the parties, vide judgment dated 14.07.2020, recorded acquittal of the accused.

6. Aggrieved from the findings of the learned trial Court, the State through Advocate General, Khyber Pakhtunkhwa, has filed the instant criminal appeal.

7. Learned AAG appearing on behalf of the State contended that since the recovery of 3045 grams chars was made from the direct possession of the accused, the version of the prosecution was also buttressed by the FSL report coupled with the straightforward and honest testimony furnished by the Seizing Officer, Investigating Officer and eyewitness, but the learned trial court due to mis-reading and non-reading of the evidence, recorded the impugned findings, which are against the law and evidence available on record, therefore, liable to be reversed.

8. We have considered the submissions of learned AAG and gone through record of the case.

9. Leaving aside other aspects of the case as to whether a person having narcotic substances on seeing a police party from sufficient distance can dare to come on nakabandi, particularly, when he had the opportunity to escape from the scene, the leading thing to be seen in the instant case is as to whether safe custody of the samples and its safe transmission to the Forensic Science Laboratory is established and, if so, whether the FSL report contains the requisite protocol as per guidelines highlighted by the august Supreme Court in a cases titled **Qaiser Javed Khan vs. The State through Prosecutor General Punjab, Lahore and another, (PLD 2020 SC 57), Khair-ul-Bashar v. the State (2019 SCMR 930), 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).** The perusal of record reveals that the Seizing Officer (PW-2), though, in his examination in chief stated that the samples for chemical analysis were taken from the recovered stuff on the same date and in this respect an application was also drafted by him but there is no evidence on record to show that during the intervening period, i.e., from 14.11.2017 to 17.11.2017, in whose custody the samples were lying, which throw serious doubt regarding safe custody of the samples and its safe transmission to the Laboratory. The Seizing Officer as PW-2 in cross examination stated that the samples were sent to the Police Station along with the murasilla through constable Aqil but the said Aqil was not examined before the trial court despite the fact that his name was cited in the calendar of witnesses and there is also no explanation as to why he was not produced before the court.

10. There is another important aspect of the case. The record reflects that the occurrence took place on 14.11.2017 while as per FSL report, Exh. PK, the samples were received by the Laboratory on 17.11.2017, after the delay of about three days. We have also perused the application Exh.PW 2/1, drafted by the Seizing Officer on 14.11.2017 for sending the samples to the FSL, which reveals that parcels No.1, 2 and 3 were sent to the Laboratory, vide receipt No. 545, dated

15.11.2017 through constable Wasim ul Haq No. 1075. When the application Exh.PW 2/1 was being drafted on 14.11.2017, the samples were not sent to the Lab: then how reference of the receipt No. 545 dated 15.11.2017 was given in the application, which portion of the evidence being not persuasive making cracks in the prosecution story.

11. Apart from the above, as evident from the receipt, the samples were handed over to Wasim ul Haq FC No. 1075 on 15.11.2017 for its onward transmission to the Laboratory, who, as per record, delivered the same in the Laboratory on 17.11.2017, thus, he was an important witness of the prosecution to confirm as to where during the intervening period from 15.11.2017 to 17.11.2017 the samples were placed and whether safe custody and its transmission to the FSL was safe, but, unexpectedly, neither his name is mentioned in the list of witnesses of the prosecution nor he was produced before the court. Even Moharrir of the Police Station was not produced before the court to substantiate the safe custody of the contraband.

12. When there is a broken chain of the safe custody of the samples and its safe transmission to the Laboratory during the intervening period, therefore, it can safely be held that the report of FSL, Exh.PK is legally defective and, thus, not admissible under the law. Hon'ble the Supreme Court in cases reported as (2018 SCMR 2039), (2015 SCMR 1002) and (2012 SCMR 577) has held that in a case where safe custody of the recovered substance or safe transmission of samples of the

recovered substance, as in the instant case, is not established by the prosecution through any independent evidence, it cannot be presumed with any degree of confidence that the prosecution has succeeded in proving its case against the accused beyond shadow of reasonable doubt.

13. We have also observed that the FSL report has not been accompanied by the requisite protocol of the tests applied. In the case titled **Khair-ul-Bashar v. the State (2019 SCMR 930)**, Hon'able the apex Court has held that:-

"10. In the present case examination of the report of the Government Analyst mentions the tests applied but does not provide their results except a concluding result, presumably of all the tests, which is not sufficient. The Report also does not signify the test protocols that were applied to carry out these tests. Hence, the mandatory requirement of law provided under Rule 6 has not been complied with and, thus, it is not safe to rely on the Report of the Government Analyst dated 18-02-2016. As a conclusion, it is reiterated, that the Report of the Government Analyst must mention (i) all the tests and analysis of the alleged drug (ii) the result of the each test(s) carried out along with the consolidated result and (iii) the name of all the protocols applied to carry out these tests."

Similarly, in the case titled **Qaiser Javed Khan vs. The State through Prosecutor General Punjab, Lahore and another, (PLD 2020 SC 57)** the august Supreme Court has observed that:-

"8. The report of the Government Analyst in the instant case does not specify the protocols of the tests applied and thus does not meet the requirements of the law as interpreted by this Court in the cases of Amam Bakhsh and Khair ul Bashar (supra). The said Report cannot be relied upon for the conviction of the petitioner."

14. Likewise, it has now been well settled that once an accused person is acquitted then strong and exceptional grounds would be required for setting aside the judgment of acquittal. We have read the entire evidence and found that the learned trial Court has based the impugned findings on correct appreciation of evidence on record by applying his conscious mind to the facts and circumstances of the case. The reasons given by him find support from the material available on the file. Moreover, standard of appraisal of evidence in an appeal against acquittal is somewhat different than an appeal against conviction, because accused is presumed to be innocent in law and if after regular trial he is acquitted he earns a double presumption of innocence and heavy burden lies on the prosecution to invalidate such presumption.

15. Since we do not see any cogent reasons to interfere with the well reasoned judgment of the acquittal of the respondent, therefore, the instant appeal being without any merit is hereby dismissed.

**Announced**

14.12.2020

\*M.Zafra PS\*

**J U D G E**

**J U D G E**

( DB Hon'able Mr. Justice Syed Arshad Ali and  
Hon'able Mr. Justice Muhammad Naeem Anwar)