

IN THE PESHAWAR HIGH COURT,
PESHAWAR,
[Judicial Department].

Cr. A No.243-P/2020

Abdullah son of Gulzar,
r/o Sheikh Kaley, Mathra, Peshawar.

Appellant (s)

VERSUS

The State

Respondent (s)

For Appellant (s) :-

Mr. Fida Muhammad Afridi, Advocate..

For State :-

Mr. Muhammad Nisar Khan, AAG.

Date of hearing:

13.09.2021

JUDGMENT

ROOH-UL-AMIN KHAN, J:- The instant Criminal Appeal under section 48 Control of Narcotic Substances Act, 1997, filed by Abdullah, the appellant, has been referred to me under section 429 Cr.P.C., as difference of opinion has arisen between my learned brothers Mr. Justice Mohammad Ibrahim Khan and Mr. Justice S.M. Attique Shah, Hon'ble Judges of the Division Bench.

2. Before reappraisal of evidence and giving my independent view, I deem it appropriate to give a brief resume of the prosecution's case.

3. According to First Information Report (FIR) Exh.PA, on 17.01.2019 at 1045 hours, Alamgir Khan SHO (PW.6) along with Constables Asif No.657 and Shah Saeed No.259, during routine patrolling, intercepted a Motorcar bearing Registration No.8250-LRB at the place known as "Double Phatak", coming

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from Nowshera's side. On query, its driver disclosed his name as Abdullah (appellant). On search of the motorcar, Alamgir Khan SHO (PW.6), recovered six and four packets of heroin, each weighing 1 Kilogram, total 10 Kilograms, from secret cavities made in the switch-board and front door, respectively. CNIC in the name of appellant, a Nokia mobile set, registration book of the motorcar and Rs.2800/-in cash, were recovered from personal search of the appellant. The Seizing Officer, separated 01 gram from each packet as sample for chemical analysis by the FSL and sealed the same into parcels No.1 to 10. He also sealed the remaining quantity into a separate parcel No.11 and affixed three seals having the monogram HY on each parcel. He took into possession the recovered contraband heroin Exh.P.2 along with articles recovered from personal possession of the appellant and the motorcar Exh.P.1 vide recovery memo Exh.PW.5/1 in presence of its marginal witnesses, drafted Murasila Exh.PW.6/2 and sent the same to the Police Station through Constable Asif, on the basis of which FIR Exh.PA was registered against the appellant. He also drafted application Exh.PW.3/6 for sending the samples to the FSL.

4. Raza Khan SI (PW.3) conducted investigation in the case, who proceeded to the spot and prepared site plan Exh.PB at the instance of Seizing Officer (PW.6), obtained physical custody of the appellant from the Court of competent jurisdiction, interrogated him and recorded his statement under section 161 Cr.P.C. He verified the motorcar from the concerned quarter vide

applications Exh.PW.3/3 and Exh.PW.3/4, respectively, placed on file the FSL report qua the motorcar, docket with regard to samples Exh.PW.3/6, receipt of FSL report Exh.PW.3/7 and extract of register No.19 Exh.PW.3/8. He also placed on file the FSL report qua the samples Exh.PZ, recorded statements of the PWs under section 161 Cr.P.C. and on completion of investigation handed over case file to the SHO, who submitted *challan* against the appellant before the learned trial Court.

5. On receipt of *challan*, the appellant was summoned from Jail and after compliance of the provisions of section 265-C Cr.P.C., he was formally charge-sheeted to which he pleaded not guilty and claimed trial. To prove its case, the prosecution examined as many as eight witnesses and after closure of the prosecution's evidence, statement of the appellant was recorded under section 342 Cr.P.C., wherein he denied the prosecution's allegation and professed his innocence. However, he declined to be examined on oath or to produce evidence in defence. On conclusion of trial, the learned trial Court, after hearing both the sides, convicted the appellant under section 9 (c) CNS Act, 1997 and sentenced him to undergo rigorous imprisonment for eight years and to pay a fine of Rs.1,00000/- or in default thereof to further undergo 06 months simple imprisonment vide judgment dated 09.03.2020, in case FIR No.27 dated 17.01.2019, under section 9 (c) CNS Act, 1997, Police Station Risalpur. Benefit of section 382-B Cr.P.C. was extended to him.

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6. The appellant questioned his conviction and sentence before this court through Cr.A. No.243-P/2020, which was heard by the Hon'ble Division Bench on 16.07.2020, however, due to equal division of opinion of Hon'ble Judges of the Bench, the appeal has been referred to me in terms of section 429 Cr.P.C. for opinion as a Referee Judge.

7. I have heard the exhaustive arguments of learned counsel for the parties and perused the record with their able assistance

8. It appears from record that Alamgir Khan SHO is the complainant and Seizing Officer of the instant case. He while appearing as PW.6, in his examination-in-chief, reiterated the same story of the arrest of appellant and recovery of contraband heroin from secret cavities of Motorcar bearing registration No.LRB.8250, being driven by the appellant at the relevant time. The facts narrated in the FIR, have already referred in the earlier part of the judgment, therefore, to avoid repetition, the same are not reproduced. He deposed that after drafting Murasila Exh.PW.6/2, the same was handed over to Constable Asif No.657, who took the same to the Police Station for registration of the case. In cross-examination he stated that only case property was sent to the Police Station and not the accused and that when the Investigating Officer (I.O) reached, the accused was available at the spot, however, the case property was not available. Kifyat Ullah ASI (PW.1), who has registered FIR Exh.PA on the basis of *Murasila* brought by Constable Asif, in cross-examination while contradicting the testimony of the Seizing Officer (PW.6)

Learned Counsel

stated that *"Accused and case property were brought to the Police Station along with Murasila and were handed over to Moharrir of the Police Station and I made entry in daily diary about the arrival of the accused and the case property at 1230 hour after lodging the FIR"*. Constable Shah Saud No.259 (PW.5), marginal witness to the recovery memo Exh.PW.5/1, says that when the I.O reached, the appellant, contraband heroin and the motorcar were available at the spot and after completion of investigation, the accused along with case property was handed over to the I.O, who shifted him the Police Station. Raza Khan SI, is the I.O of the case. He while appearing as PW.3 in cross-examination stated *"when I reached the spot, the case property and the accused were not available. The accused and case property were already sent to the Police Station by the SHO. At the time of my departure from Police Station to the spot, I had not seen the accused and the case property in the Police Station. I cannot say that through whom the accused and case property were shifted to Police Station before my arrival to the spot"*. Wali Rehman MHC while appearing as PW.4 deposed that complainant SHO himself brought the case property along with parcels to the Police Station and handed over the same to him and in this respect he made entry in register No.19 copy of which is Exh.PW.3/8. In cross-examination he states that accused and the case property were brought to the Police Station at 1315 hours and that when the Murasila was brought to the Police Station without accused and case property. He admitted it correct

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that in daily diary No.18 dated 17.01.2019, it is mentioned that only accused was brought to the Police Station and put in the lockup of the PS. Nothing is mentioned in the said daily diary with regard to the contraband heroin and the motorcar. He further admitted that in Exh.PW.3/8 it is not mentioned that when and from whom the case property was received and when and through whom the samples were sent to the FSL. Constable Najeeb Ullah who took the samples to the FSL, while appearing as PW.7 deposed that Madad Moharri of the Police Station handed over him parcels No.1 to 10 for onward transmission to the FSL, however, he has not put his signature in the relevant column of Register No.19 Exh.PW.3/8. In the Murasila the time of occurrence is shown as 10.45 a.m and time of report as 12.10 p.m., whereas Constable Shah Saud (PW.5), the purported eyewitness, in cross-examination states that they consumed 40/45 minutes at the spot and returned to Police Station at 11.30 a.m. and thereafter never visited the spot. If the time of report in the Murasila drafted at the spot is 12.10 p.m. then return of the Seizing Officer and marginal witness to Police Station at 11.30 a.m. is beyond the comprehension of a prudent mind. Contrary Raza Khan SI/I.O. (PW.3), states that investigation of the case was handed over to him at 1240 hours and he reached the spot at 1245 hours and remained there along with complainant and PWs for about one hour and thirty minutes i.e. from 1245 to 1415 hours. After spot inspection he returned to Police Station whereas the complainant and PWs left the spot for gusht. The testimony of

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the I.O. totally contradicts the statement of Constable Shah Saud, marginal witness to the recovery memo. Besides, according to daily diary No.18 (ibid), the accused was brought by the complainant SHO (PW.6) and put in the lock up of Police Station at 1315 hours. How the Seizing Officer remained present at the spot with the Investigation Officer from 12.45 to 1415 hours, is yet another disturbing aspect damaging the prosecution's case.

9. The contradictory statements of the material and star witnesses of the prosecution, namely, Alamgir Khan SHO (PW.6), Constable Shah Saud (PW.5), Raza Khan SI/I.O (PW.3), Wali Rehman (PW.4), and Najeeb Ullah (PW.7) coupled with daily diary No.18 dated 17.01.2019, create serious doubt qua seizing of the alleged contraband, arrest of the appellant, shifting the case property from the spot to the Police Station and brining the vehicle and the appellant their handing over to Moharrir of the Police Station. Each one of the witnesses has furnished totally a different stance with regard to shifting of the appellant, the alleged recovered contraband heroin and the motorcar to the Police Station. There appears no chain from the prosecution evidence qua safe custody and transmission of the samples from the spot to the FSL. Constable Asif who brought the Murasila to the Police Station might have clarified the aforesaid disturbing situation, but astonishingly, he was abandoned by the prosecution for no good reason. Similarly, the Madad Moharrir who handed over the samples in parcels No.1 to 11 to Constable Najeeb Ullah, has also been abandoned for no good reason. In the judgment

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reported as (2018 SCMR 2039), the Hon'ble Supreme Court has held that:-

“Chain of custody began with the recovery of the seized drug by the police and included the separation of the representative sample(s) of the seized drug and their dispatch to the Narcotics Testing Laboratory. Said chain of custody was pivotal as the entire construct of the Control of Narcotic Substance Act, 1997 and the Control of Narcotic Substances (Government Analysts) Rules, 2001 rested on the report of the Government analyst, which in turn rested on the process of sampling and its safe and secure custody and transmission to the Laboratory. Representative samples of the alleged drug must be in safe custody and undergo safe transmission from the stage of recovery till it is received at the Narcotics Testing Laboratory. Prosecution must establish that the chain of custody was unbroken, unsuspecting, indubitable, safe and secure. Any break in the chain of custody or lapse in the control of possession of the sample, would cast doubts on the safe custody and safe transmission of the samples(s) and would impair and vitiate the conclusiveness and reliability of the report of the Government Analyst, thus, rendering it incapable of sustaining conviction. (emphasis supplied).

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10. In case titled, “Abdul Ghani and others vs the State and others” (PLJ 2019 SC (Cr.C) 462) the Hon'ble supreme Court, without discussing the merits of the case, on the sole ground of missing chain of safe transmission of the samples from the spot till receipt in the FSL and non-production of the relevant witnesses in whose custody the samples remained, allowed the

appeal and acquitted the convicts/appellant by setting aside the concurrent findings of the two courts below. Relevant paragraph of the judgment (supra) is reproduced below for the sake of convenience and ready reference:-

“There is hardly any occasion for discussing the merits of the case against the appellants because the record of the case shows that safe custody of the recovered substance as well as safe transmission of samples of the recovered substance to the office of the Chemical Examiner had not been established by the prosecution in this case. Nisar Ahmad, S.I./SHO complainant (PW.1) had stated before the trial Court that he had deposited the recovered substance at the Malkhana of the local Police Station but admittedly the Moharrir of the said Police Station had not been produced before the trial Court to depose about safe custody of the recovered substance. It is also not denied that Ali Sher HC, 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. It has already been clarified by this Court in the cases of the State through Regional Director ANF v Imam Bakhsh and others (2018 SCMR 2039), Ikram Ullah and others vs the State (2015 SCMR 1002) and Amjad Ali v the State (2012 SCMR 577), that in a case where safe custody of the recovered substance or safe transmission of samples of the recovered substance is not proved by the prosecution through independent evidence there it cannot be concluded that the prosecution had succeeded in establishing its case against the appellants beyond reasonable doubt. The

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case in hand suffers from the sale legal defect. This appeal is, therefore, allowed, the convictions and sentences of the appellants recorded and upheld by the courts below are set aside and they are acquitted of the charge by extending the benefit of doubt to them". (**Bold and underlines supplied emphasis**).

11. Yet there is another aspect of the case, the FSL report Exh.PZ reveals that Chemical Examiner has not specified protocols of the test applied to each sample which was the mandatory requirement under Rule 6 of the Government Analysts) Rules, 2001. In the judgment dated 18.12.2019, rendered in case titled, "*Qaiser Javed Khan vs the State through Prosecutor General Punjab Lahore and another*" the Hon'ble apex Court has held that:-

"The report of the Government Analyst in the instant cases 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 Imam Bakhsh and Khair ul Bashar (supra). The said Report cannot be relied upon for conviction of the petitioner. Therefore, the petition is converted into appeal and allowed. The conviction and sentence of the petitioner are set aside. He shall be released forth if not required to be detained in any other case".

12. Another serious damaging aspect of the prosecution's case is that according to FIR, the Seizing Officer, namely, Alamgir Khan SHO (PW.6), recovered ten packets each containing 1000 grams heroin, total 10 Kilograms, but during

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trial on the request of the learned defence counsel, the case property was opened/de-sealed and weighed. The learned trial court observed the weight of ten packets of heroin as 980, 1004, 1000, 988, 1010, 1002, 982, 1036, 1006, and 922 grams each, respectively. By considering the glaring difference in the weightment of packets, it is quite strange that some of the packets were exceeding 1000 grams and some were considerably less than the quantity shown in the Murasila, recovery memo and FIR as well as by the PWs in their statements. The Seizing Officer or any other prosecution witness could not furnish any explanation, much less plausible, to clarify and justify the difference in the weight of each packet of contraband heroin.

13. Another doubtful side of the prosecution case is that, Alamgir Khan SHO (PW.6) in cross-examination admits that his signature on the recovery memo, Murasila and arrest card of the appellant is different from his signature over the complete challan and it happened because of rush of work. He further admitted that these documents are not in his handwriting, rather were drafted by someone on his dictation, however, he does not remember the name of the person who drafted the said documents. As per contents of Murasila at the time of occurrence only Constable Shah Saud and Asif were accompanying the Alamgir Khan SHO, out of whom the latter has been abandoned and the former has been examined as PW.5. In cross-examination, Constable Shah Saud denied drafting of Murasila, recovery memo and arrest card of the appellant on the dictation of Alamgir Khan SHO by

Constable Shah Saud

someone. Raza Khan SI/I.O. (PW.3) when confronted with the recovery memo, Murasila and arrest card of the appellant, he admitted it correct that signature of Alamgir Khan SHO on the said documents is different from one another. He deposed that the said documents were prepared in his presence on the dictation of the SHO. However, he also could not name the person who drafted these documents. The contradictory statements of the three PWs on the factum of preparation of Murasila, recovery memo and arrest card of the appellant create serious doubts in the prosecution's case and pinch a prudent mind that the occurrence has not taken place in the mode and manner as alleged in the FIR. Person who drafted these documents on the dictation of the SHO is still unknown. Similarly, if these documents were prepared in the presence of I.O. by the SHO, then it suggests that the I.O. was present with the Seizing Officer before the occurrence. It would not be wrong to say that where a law is strict in nature and provides severe punishment, then its application and evidence in proof of the guilt of an accused requires strict adherence for safe administration of justice.

14. On reappraisal of evidence, I have reached to an irresistible conclusion that prosecution has miserably failed to prove the guilt of the appellant through cogent and confidence inspiring evidence beyond the shadow of reasonable doubt. The prosecution evidence is pregnant with doubts benefit of which is to be given to the appellant/accused as a matter of right. It is settled law that prosecution is duty bound to prove its case

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beyond any reasonable doubt and if any single doubt is created, benefit of the same must go to the accused and entitle him for earning acquittal as the accused is always considered the most favorable child of law. Guidance in this regard can be derived from case titled, "**Tariq Pervaz Vs the State**" (1995 SCMR 1345) and case titled, "**Muhammad Akram Vs the State** (2009 SCMR 230) and **Faryad Alis 20 case** (2008 SCMR 1086). Basically, it is the principle enshrined in Islamic jurisprudence, fourteen hundred years ago that **"it would be better to acquit ten culprits than convicting one innocent soul."** which has now been transformed into the form of the principle that, **"acquitting by error would be better than convicting by error"**. The said commandment has evolved into the theory of benefit of doubt, which, invariably, is extended to the accused for safe administration of criminal justice.

15. Accordingly, I while extending benefit of doubt to the appellant, allow this appeal, set-aside his conviction and sentence under section 9 (c) CNS Act, 1997, recorded vide judgment dated 09.03.2020 and hereby acquit him from the charge in case in case FIR No.27 dated 17.01.2019, Police Station Risalpur. He be set at liberty forthwith if not confined in any other case.

16. Before parting with the judgment, I deem it appropriate to mention here that it would be injustice to keep mum on the conduct of the PWs in the case of recovery of huge quantity of heroin weighing ten Kilograms, who are either incompetent or have intentionally damaged the prosecution's case for extraneous

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reasons or monetary gain or have either falsely implicated the appellant. The Public Prosecutor has also abandoned or not produced an important witness, without any reason. Whatever the reality may be but it is high time to inform the high ups of Police Department to look in to the matter and proceed the delinquent Officer(s)/Official(s) under the law.

17. The worthy Additional Registrar (Judicial) of this Court is directed to sent copy of this judgment to the worthy Inspector General of Police (IGP), Khyber Pakhtunkhwa and DIG/RPO, Mardan Region, well as the DPO & the SSP (Investigation), Nowshera, along with copy of record of the case and statements of the PWs with the direction to look into the matter and proceed the delinquent PWs stringently under the law, under intimation to this Court.

Announced:

13.09.2021

M. Siraj Afridi PS

Rooh ul Amin
Senior Puisne Judge

Mr. Justice Rooh ul Amin Khan Hon'ble Senior Puisne Judge