

Judgment Sheet
IN THE PESHAWAR HIGH COURT,
PESHAWAR
(Judicial Department)

Writ Petition No.6372-P of 2019
(converted from Cr. MBA No.3363-P of 2019)

Jehangir Vs. State

Date of hearing 27.12.2019

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Mr. Noor Alam Khan, Advocate, for the petitioner.

Mr. Atif Ali Khan, AAG, for the State.

JUDGMENT

AHMAD ALI, J. Petitioner, Jehangir, through the present petition is seeking his release on bail till final decision of the case registered vide FIR No.520 dated 18.10.2019 u/s 9-D of K.P. CNSA, 2019, Police Station, Risalpur, district Nowshera.

2. Facts as divulged in the FIR are that the complainant Jan Muhammad Khan SHO on the basis of spy information laid picketing at Motorway Rashkai Interchange and after sometime a motorcar, driven by the accused/petitioner, arrived there; whereas, co-accused Daud Shah was sitting in

the car alongside the driving seat. On checking of motorcar eight packets of Charas, containing total quantity of 9362 grams and two packets of opium containing total quantity of 2035 grams was recovered. Hence, the present FIR under the K.P. CNSA 2019, was registered.

3. Arguments heard and record gone through.

4. Perusal of the record reveals that the accused/petitioner was arrested having possession of 9.362 kilograms Charas and 2.035 kilograms opium and thereby a case vide FIR No.520 dated 18.10.2019 u/s 9-D of the Khyber Pakhtunkhwa Control of Narcotics Substances Act, 2019 was registered at Police Station Risalpur, District Nowshera and accordingly the accused/petitioner was arrested. Petitioner initially preferred bail petition before the learned Addl Sessions Judge Nowshera which was dismissed vide order dated 26.10.2019.

5. The present case was registered under Section 9-D of the Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019 (*hereinafter referred as the Act*, passed by the Provincial Assembly of Khyber Pakhtunkhwa on 27.08.2019 and published in the official gazette on 04.09.2019. Being a special law, the provisions of the Act are to be complied with and followed in the letter & spirit. According to the Section

28 of the Act, all the powers of entry, search, seizure and arrest without warrant have been vested in the authorised officer. The Section 28 of the Act, reads as under:

28. Power of entry, search, seizure and arrest

without warrant.---(1) Where an authorized officer, who from his personal knowledge or from information given to him by any person, is of the opinion that any narcotic substance is kept or concealed in any building, place, premises, dwelling house or conveyance and warrant for the search or arrest cannot be obtained from the Special Court against such person without affording him an opportunity for the concealment of evidence or facility for his escape, such officer may-

- (a) enter into any such building, place, premises, dwelling house subject to the proviso of sub-section (1) of Section 27 of this Act;
- (b) break open any door and remove any other obstacle to such entry in case of resistance;
- (c) seize such narcotic substances, methamphetamine and other materials used in the manufacturing thereof and any other article or documents which he has reason to believe to be liable for confiscation or may furnish evidence of the

commission of an offence punishable under this Act; and

(d) search and, if he thinks proper, arrest any person whom he has reason to believe to have committed an offence punishable under this Act.

(2) Before or immediately after taking any action under sub-section (1), the authorized officer, mentioned in sub-section (1), shall record the grounds and basis of his information and take immediate necessary action and forthwith send a copy of the same to the Director or as the case may be to the Regional Police Officer.

6. Whereas, section 30 of the Act confers powers to the **“authorised officer”** to stop and search any conveyance. The authorised officer, as defined in Section 2(c) of the Act is either the officer of the Directorate General not below the rank of sub-Inspector, authorized by the Director or a Police Officer not below the rank of sub-Inspector authorized by the Regional Police Officer. Whereas, ‘Directorate General’ refers to the Director General of the Excise, Taxation & Narcotics Control Department. A bare reading of the Section 2(c) of the Act makes is clear that not every sub-Inspector or higher ranked officer of the police department can act as an ‘authorised officer’ but only the officer authorised by the Regional Police Officer can stop & search any conveyance or

person and make seizure therefrom. However, the entire record is silent with regard to any authorization by the Regional Police Officer to the complainant to perform duties as an authorised officer under the Act of 2019. Therefore, it would be determined at trial stage as to whether seizure and arrest etc by the complainant are legally warranted or not? and till then the accused/petitioner cannot be detained behind the bars where the status of Complainant himself is dubious.

7. Yet there is another noticeable legal aspect of the case i.e. according to Section 33 of the Act of 2019, any person arrested and articles seized under the Act shall be produced within twenty-four hours of the arrest or seizure before the Special Court and only a special Court has been conferred with the jurisdiction to take any measures for the disposal of seized articles and person arrested. Section 33 of the K.P. CNSA 2019 is reproduced below for ready reference:

33. Disposal of articles seized and person

arrested.---(1) Any person arrested and articles seized under this Act, shall be produced, within twenty-four (24) hours of the arrest or seized, before the Special Court by whom the warrant was issued.

(2) The special Court to whom the accused and articles etc. are produced under sub-section (1) shall, with all convenient dispatch, take such measures as may be necessary for the disposal of the articles so seized and person arrested.

8. The Special Court within the purview of Section 22 of the Act is a Court established by the provincial government and notified in the official Gazette for which Judges have to be appointed after the consultation with the Chief Justice of Peshawar High Court. There is no cavil with the proposition that till date no notification as to the establishment of the Special Court has been issued by the Provincial Government of Khyber Pakhtunkhwa nor judges have been appointed there-for. Now a legal question arises that whether in the absence of Special Courts, the production of narcotic substances and accused before an ordinary Court of Sessions can fulfil the mandate of Section 33 of the Act and whether the Court of Sessions Judge has the jurisdiction to deal with the articles seized by the complainant and person arrested and to pass any order regarding the fate of same. When law provides an act to be done in a specific manner, then it should

be done accordingly. This legal infirmity makes the accused/petitioner entitled for the concession of bail.

9. Now adverting to another aspect of the case; it is the case of prosecution that the purported narcotics was wrapped in different packets and was weighed by the complainant through a digital scale. The contents of FIR as well as possession memo dated 18.10.2019 reflect that the contraband was weighed with wrapper, as there is nothing to suggest that the wrapper was removed by complaint before taking weight of each parcel. This fact makes the very quantity of contraband doubtful and it is still a mystery that what was the actual weight of the purportedly recovered Charas and Opium. Besides nature of the Charas as to whether it was Garda or Pukhta is not mentioned in the FIR or possession memo. Moreover, there is no mention of the destination on which the contraband was to be supplied. Similarly, the place of despatch of the narcotic substance is not mentioned in the FIR nor investigated by the investigating officer. This court in the case of Tahir Khan and another Vs. the State 2019 M L D 361 (Peshawar) has already expressed the following view:

“Perusal of available record would depict that both the accused-petitioners have been arrested by the complainant party on the

allegations of having contraband, allegedly to be smuggled to Peshawar, but neither the nature of contraband either Garda or Pukhta charas was mentioned in the FIR, nor their destination and nor their alleged place of communication from-where the charas was dispatched, has been brought on record. Furthermore, nothing was brought on record in respect of the seized vehicle, whether it was in the name of accused-party or otherwise nor previous history of accused-petitioners has been brought on record to show their involvement in such like activities. Since their arrest, accused-petitioners have been investigated/interrogated but neither any further recovery has been made nor they confessed their guilt. Moreover, a mistaken relief of bail may be repaired by convicting the accused, if proved guilty, but no proper reparation can be offered for his unjustified incarceration, albeit, his acquittal in the long run. Reliance is placed on the case of *Zaigham Ashraf v. The State and others*, reported in 2016 SCMR 18.”

10. It is undeniable fact on the face of the record that the narcotic substances were not recovered from the immediate possession of the accused/petitioner rather the same was recovered from the secret cavity of the switch board; thus, the petitioner cannot be connected with the same at this stage. Besides, the co-accused Daud Shah, who was present alongside the petitioner on front seat of the motorcar, has already been admitted to bail vide order 26.10.2019, therefore, the accused/petitioner too is entitled to the concession of bail. Reliance is place on the case of Gulab Din Vs. the State **2013 P Cr. L J 1160 (Peshawar)**.

11. For the reasons mentioned above, this petition is allowed and the accused/petitioner is admitted to bail subject to furnishing of bail bonds in the sum of Rs.400,000/- with two reliable sureties who shall be men of means to the satisfaction of Illaqa/Duty Judicial Magistrate.

12. Above are the detailed reasons of short order of even date.

Announced.
27.12.2019.

CHIEF JUSTICE

J U D G E