

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

Crl. Appeal No.766-P of 2021

Shehzada Khan son of Khan Zada,
r/o Wazir Dand Shah Kas Jamrud,
District Khyber.

Appellant (s)

VERSUS

The State

Respondent (s)

For Appellant (s) :-
For State :-
Date of hearing:

Mr. Ali Zaman, Advocate
Malak Akhtar Hussain Awan, Advocate.
07.02.2022

JUDGMENT

ROOH-UL-AMIN KHAN, J:- This criminal appeal filed by Zarwais Khan, the appellant, is directed against the judgment dated 15.07.2021, passed by learned ASJ-II/Judge Special Court, Khyber, whereby the appellant has been convicted under section 9 (d) Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019, and sentenced to undergo five years rigorous imprisonment and to pay Rs.500,000/- as fine or in default thereof to further undergo six month simple imprisonment, in case FIR No.199 dated 01.09.2020, registered under section 9 (d) and 15 KP Arms Act, 2013 at Police Station Jamrud.

2. The prosecution's case as unfolded in the First Information Report (FIR) Exh.PW.2/1 is that on receipt of spy information about availability of huge quantity of narcotics in the house of appellant, on 01.09.2020 Adnan Khan SI (PW.4) along

For the State

with other police officials including the SHO Police Station Jamrud, raided the house of appellant, apprehended him in the court-yard of his house along with a polythene bag in his hand, search of which led to the recovery of three packets of heroin, each weighing 1000 grams, making the total of 3000 grams. The complainant-SI (PW.4), separated 05 grams from each packet as sample for chemical analysis by the FSL. On search of the house, he also recovered a Kalashnikov bearing No.AA.99999630578 along with fixed charger, containing 9 live rounds of the same bore. He took the alleged recovered heroin, arm and ammunitions vide recovery memo Exh.PW.4/1 in presence of its marginal witnesses, drafted Murasila Exh.PW.4/2 and sent the same to Police Station on the basis of which FIR Exh.PW.2/1 was registered against the appellant.

3. On receipt of copy of FIR, Tilawat Shah SI (PW.7) proceeded to the spot and prepared site plan Exh.PW.7/1, on the pointation of the Seizing Officer, recorded statements of the PWs under section 161 Cr.P.C, sent the samples to the FSL, report whereof is Exh.PW.7/5 and on completion of investigation submitted challan under section 9 (c) KP CNS Act, 2019 and challan under section 15 KP Arms Act, 2013, against the appellant before the learned trial Court.

4. On receipt of challan by the learned trial court, the appellant was summoned and formally charge sheeted to which he pleaded not guilty and claimed trial, hence, prosecution evidence was invited. On closure of the prosecution's evidence,

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statement of the appellant was recorded under section 342 Cr.P.C, wherein he denied the prosecution's allegation and professed his innocence. He, however, 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 and sentenced the appellant as mentioned above, hence, this appeal.

5. Arguments of learned counsel for the parties heard and record perused.

6. In the FIR, the time of occurrence is shown as 0300 hours in the month of September i.e. midnight. From the very initial report Exh.PW.4/2, the story of the prosecution seems dubious. It is the case of prosecution that when complainant Adnan Khan SI along with other police official including the SHO of Police Station Jamrud, raided the house of the appellant, he was standing in the courtyard of his house having in his possession a polythene bag containing 03 Kgs heroin. Presence of the appellant, in the courtyard of his house at 0300 hours (night), that too, along with 03 Kgs heroin, is beyond the comprehension of a prudent mind as in such hours of night people are found in their beds and not in the courtyard. Adnan SI (PW.4) in cross-examination has admitted that he has not annexed with record daily diary showing his departure and arrival in Police Station on the day of occurrence. He further admitted it correct that SHO Police Station Jamrud was also present with him in the raid, but he has not cited him as witness to recovery proceeding. The complainant SI has not furnished any explanation, much less

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plausible, as to why the SHO, who was Incharge of the Police Station did not became complainant and Seizing Officer in the case. Complainant SI (PW.4) has further admitted that they were not accompanied by any lady constable and that at the time of raid two female inmates along with children were also present in the spot house. He further admitted it correct that he has not sealed the recovered Kalashnikov into parcel on the spot and that no note-able of the locality was associated with the alleged recovery proceedings. Non-association of any noteable of the area as well as lady constable with the raid and recovery proceedings not only makes the recovery highly doubtful but amounts to violation of the provisions of sections 27, 28 and 31 of the Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019 (Act of 2019). Under Proviso attached to section 27 of the Act of 2019, in case of search of the dwelling house, the Officer conducting search shall accompany lady constables and shall given an opportunity to the women of such dwelling house to observe *pardh* in order to maintain the dignity and modesty of the women and dwelling house. Similarly, under proviso to section 31 of the Act of 2019, in case of search of a dwelling house, the provisions of section 103 Cr.P.C. shall be strictly observed. Section 32 of the Act of 2019, provides penal consequences, in case of non-compliance of the provisions of section 27 of the Act of 2019, according to which an officer authorized under section 27, if enters into dwelling house without compliance of section 103 of the Code or does not give an opportunity to women of

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such dwelling house to observe pardha, as provided in sub-section (1) of section 27, shall be punishment with imprisonment for a term which may extend to three years and shall also be liable to fine which may extend to rupees one lacs but shall not be less than rupees fifty thousands. The above mandatory provisions of the law have been blatantly violated by the complainant/Seizing Officer in the instant case, therefore, he is liable to face the legal consequences under the law.

7. Neither the complainant SI nor the Investigating Officer has brought on record an iota of evidence to prove the spot house was the sole ownership of the appellant or in his sole occupation. Rather, from the prosecution evidence it is proved that two females along with children were also present in the spot house meaning thereby that the house was jointly owned. Aziz ASI (PW.6), who was posted as Moharrir in Police Station Jamrud on the day of occurrence has stated that the Kalashnikov handed over to him by Adnan Khan SI was not in sealed condition. Tilawat Shah SI (PW.7)/Investigating Officer in cross-examination has stated that the spot house was consisting of several rooms and that he has not recorded statement of any person of the surrounding houses. He further admitted that in Register No.19 column No.6, 7 and 8 are blank and in application to the FSL, receipt number, name of the person who took the samples to the FSL are also not mentioned.

8. On reappraisal of the prosecution's evidence, I have reached to an irresistible conclusion that the recovery of


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contraband narcotic, arm and ammunition from the house of the appellant as alleged by the prosecution, is highly doubtful, benefit of which is to be extended to the appellant.

8. Accordingly, this appeal is allowed. Conviction and sentences of the appellant recorded by the learned trial Court vide judgment dated 15.07.2021, are hereby set-aside and the appellant is acquitted from the charge leveled against him in the instant case. He be set at liberty forthwith if not confined in any other case.

9. Before parting with the judgment, the learned trial Court is directed to open separate file against the Seizing Officer/complainant of the instant case for proceedings against him under section 32 of the Act of 2019, after giving him proper notice and providing him an opportunity of hearing. Copy of this judgment along with judicial record be transmitted to the learned trial court for onward proceedings at that end strictly in accordance with the provisions of section 32 of the Act of 2019.

Announced:
07.02.2022
M.Siraj Afridi PS


Senior Puisne Judge