

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
BANNU BENCH

[JUDICIAL DEPARTMENT]

Criminal Appeal No. 321-B/2019

PRESENT: -

For the appellant: - Mr. Iftikhar Durrani, Advocate.

For the State: - Mr. Qudrat Ullah Khan Gandapur,
Asstt: AG for the State.

Date of hearing. 22.09.2021.

J U D G M E N T

MUHAMMAD NAEEM ANWAR, J.- As per prosecution story, on 12.08.2018, Afzal Awan Khan, SHO, Police Station, Yaqoob Khan Shaheed, Takhat-e-Nasrati, (PW-4) received information regarding smuggling of the narcotic substances towards Punjab in a Motorcar, so, acting upon such information, he along with other police party arranged 'nakabandi' near Naray Khawara Chowkara Qaberistanat, when at 18.00 hours, the spotted motorcar bearing registration No. U-8426/Karachi arrived and its search led to the recovery of 14000 grams chars garda from its doors. (4/4 packets from the rear doors & 3/3 packets from front doors, total 14000 grams). The driver of the vehicle disclosed his name as Rasheed Zaman, consequently, a murasilla in this respect was drafted which was sent to the Police Station, where on the basis of it, a case FIR No. 431, dated 12.08.2018, under section 9 (c) CNSA was registered against the accused.

02. After completion of investigation, complete challan was submitted before learned Judge Special Court, Karak at Takhat-e-Nasrati, where on the commencement of trial, the prosecution in order to prove its case produced eight witnesses and after closure of the prosecution evidence, the accused was examined under section 342 Cr. P.C wherein he pleaded innocence and stated to have falsely been implicated in the case. However, he was neither ready to be examined on oath under section 340(2) Cr. P.C nor wished to produce defence. The learned trial court after hearing the parties, convicted and sentenced the accused under section 9 (c) of the Control of Narcotic Substances Act to undergo rigorous imprisonment for life and further directed to pay fine of Rupees five lac or in default thereof to further undergo six months SI with benefit of section 382-B Cr. P.C, vide judgment dated 11.10.2019. It is pertinent to mention that during interrogation/investigation appellant-convict disclosed the names of other co-accused as Sabir-Ur-Rehman alias Khattaki son of Badshah Khan resident of Odin Shah Kalla, Dost Ali son of Zain Ullah, Younas Ullah son of Piao Ullah resident of Sarki Lawaghar Tehsil Takhat-e-Nasrati, District Karak. Amanat Ullah Khan son of Yaristan resident of Dourwi Khel Orazaki Agency and Amjad Ali son of Rasheed Ali resident of Khwaida Khel Cheray Kada Bazar Orakazi Agency who being not arrested

were declared proclaimed offenders and case property was kept intact till their arrest.

03. Rasheed Zaman alias Khattaki son of Misal Khan Muhammad, the convict-appellant, filed the present criminal appeal No.321-B of 2021 before this court against his conviction and sentence.

04. Arguments heard and record perused.

05. It appears from the record that neither the testimony of the prosecution witnesses is in tone with each other nor the safe custody or safe transmission of the recovered substance or the samples thereof has been established by the prosecution. The complainant while appearing as PW-4, though, stated in his examination in chief that after completion of legal formalities, all these articles, including Pakistani currency amounting to Rs. 2200/-, PSO card, driving license & Nokia Mobile were sealed into parcel No.16 which is Ex. P2 and vehicle and contraband were taken into possession vide recovery memo Ex PC thereafter, murasilla (EX PA/1) was sent to the Police Station through constable Aman Ullah (PW-6), for registration of the FIR, yet PW-2, Islam Noor ASI, who had incorporated the contents of murasilla into FIR Ex.PA, has said nothing about the contraband or receipt of the samples or its safe custody. Head Constable Aman Ullah was examined as PW-6 and he in examination in chief too has said nothing about sending of case property or samples

through him to the Police Station. He only deposed that he was handed over murasilla which he has delivered to Aslam Noor ASI. Regardless of the statement of PW-4 who deposed that he has handed over the case property to the Moharrir on the same day but his statement was also belied by the record on two-fold firstly, Moharrir has not authenticated nor even uttered a single word about the receipt of case property from PW-4 secondly, after report he remained at the spot for five hours, the time of crime report was 18:40 hours where PW-4 remained for five hours i.e., till 23:40 hours and the distance between PS and the place of occurrence can not be covered in less than 15 minutes then the delivery of recovered substance or receipt thereof on the same day i.e., 12.08.2018 in the PS was not possible. Furthermore, complainant stayed at the spot for about five hours after report but as per Naqalmad No. 33 he was in the PS at 2300 hours which itself negates the version of the complainant. During cross examination, PW-2 also contradicted the statement of complainant by deposing that except the murassila nothing was handed over to him. No doubt moharrir of the Police station was examined to testify the factum of receipt of case property or its safe custody in the Police Station or its dispatch to the laboratory and placed on file the copy of relevant record from register 19 Ex Pw1/1 but interestingly it bears no date of receipt of case property. Thus, from the above discussed evidence neither

sending of neither the receipt of case property nor its safe custody has been established nor there is any explanation regarding the samples as where the same were lying during the intervening period with specific date of receipt till 03.09.2018.

06. Likewise, the record shows that the samples of the recovered substance had been delivered at the office of the Chemical Examiner by Noor Afzal FC-191 on 04.09.2018 while, as per 'rahdari receipt', marked as Ex. PW ½ dated 03.09.2018, which too is doubtful because the samples were received by him (Noor Afzal) from the Moharrir on 03.09.2018 but were delivered to the chemical examiner on 04.09.2018, though he in his examination in chief deposed that due to protest on the issue of non-supply of gas he proceeded to Peshawar on 04.09.2018 but in his cross examination he said that on 03.09.2018 the said samples and rahdari receipt was returned to the moharrir, then of which rahdari receipt he travelled with sample to Forensic Science Laboratory Peshawar, record is silent to this effect. As per record the samples were collected on 12.08.2018 but were delivered to the examiner on 04.09.2019 thus, there is nothing on record to show the safe custody of the samples for the period from 12.08.2018 to 04.09.2018 or its safe transmission to the Laboratory. Hon'able the apex court of the country has repeatedly held that the chain of custody begins from the recovery of the seized Charas by the police

and includes the separation of the respective sample(s) of the seized narcotics and their dispatch to the Narcotics testing Laboratory. This chain of custody is pivotal as the entire construction of the Act and the Rules rests on the report of the Government Analyst, which in turn rests on the process of sampling, and its safe and secure custody and transmission to the laboratory. The 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, will cast doubts on the safe custody and safe transmission of the sample(s) and will impair and vitiate the conclusiveness and reliability of the report of the Government Analyst thus, rendering it incapable of sustaining conviction. Rel: (2012 SCMR 577, 2015 SCMR 1002, 2018 SCMR 2039, 2019 SCMR 1217, 2019 SCMR 1300, 2019 SCMR 2004 & 2020 SCMR 687.

07. Moreover, the FSL report, marked as Ex.PK, relied upon by the prosecution also does not contain the full protocols of the test applied for and 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: 2018 SCMR 2039, 2019 SCMR 930 and PLD 2020 SC 57.

08. So, in view of the above discussed evidence and dictum laid down by the Hon'ble supreme Court, (supra) the report of the Chemical Expert relied upon by the prosecution in the instant case being inconclusive and unreliable cannot be made a basis to sustain conviction and sentence of the appellants. Thus, the aforesaid elements of doubt surrounding the prosecution case have led us to an irresistible conclusion that the prosecution has failed to prove its case against the appellants beyond reasonable doubt and when so, we in the interest of safe administration of justice by giving benefit of doubt to the appellants allow this appeal, resultantly, the impugned judgment is set aside and, accordingly, the appellants Rasheed Zaman is acquitted of the charge levelled against him. He be set at liberty forthwith, if not required in any other case.

Above are the reasons of our short order of even date.

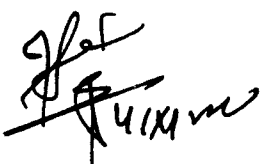
Announced
22.09.2021.
Ehsanullah PS



JUDGE



JUDGE



SCANNED

05 OCT 2021

Khalid Khan

(D.B)
(Hon'ble Mr. Justice Sahibzada Asadullah &
Hon'ble Mr. Justice Muhammad Naeem Anwar).