**Judgment Sheet**
**PESHAWAR HIGH COURT, BANNU BENCH**
*(Judicial Department)*

**Cr.A No.258-B of 2022**

Kashmaloo
Vs
The State

***JUDGMENT***

For Appellant: **Mr. Imran Ali Shah Mandan Advocate**

For State: **Hafiz Muhammad Hanif, Asstt. A.G.**

Date of hearing: **04.04.2023**

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***SHAHID KHAN, J.---*** Appellant, Kashmaloo, after having been tried by the learned Judge, Special Court / Additional Sessions Judge-II, Karak, was convicted and sentenced under section 9(d), Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019, to rigorous imprisonment for life with fine in the sum of Rs.5,00,000/- or in default thereof, to suffer 12 months S.I. vide judgment, dated 15.12.2022 rendered in case FIR No.252, dated 21.08.2021 registered under section 9(d) *ibid* at Police Station Sabirabad, District Karak. It obliged the appellant to approach this Court through the subject appeal.

**2.** Brief, but relevant facts, culminating in registration of the case, are that on 21.08.2021 at around 17:00 hours, complainant Qabil Khan SHO (PW-06) accompanied by police contingent had made barricade at Kamran Shaheed Chowk, when noticed a

person coming from Tabbi side with two cartons in his hands. The person being suspected was stopped where the cartons, in his possession, were searched which led to recovery of 10 / 10 packets of Charas, each of which contained different quantities. After due weighment, the total quantity came out 24280 grams and as such, the Charas were taken into possession after separating sample parcels of 05 / 05 grams from each of the recovered packets for the purpose of chemical analysis at the Forensic Science Laboratory vide recovery memo Ex.PW-6/2, duly attested by marginal witnesses. The person was accordingly arrested, who disclosed his name as Kashmalo son of Kafeel resident of Jamal Khel, Tehsil Landi Kotal, District Khyber. Murasila was drafted & prepared and was sent to the police station through constable Muhammad Arif No.380 for registration of the case. Hence, the *ibid* FIR.

**3.** After completion of investigation, complete challan was drawn and accordingly sent up for trial. To substantiate its version, the prosecution placed reliance on the account / statements of as many as 08 witnesses. On close of prosecution evidence, statement of accused appellant was recorded under section 342 Cr.P.C, wherein, he professed innocence and false implication, however, he neither opted to be examined on oath as provided under section 340(2) Cr.P.C nor wished to produce defence evidence. After hearing arguments, the learned trial

Court arrived at the conclusion that the prosecution has successfully brought home charge against the appellant, as such, vide impugned judgment, dated 15.12.2022, convicted and sentenced the appellant as mentioned above. Hence, the instant appeal against the judgment of conviction.

**4.** We have heard at a considerable length learned counsel for the appellant as well as the worthy Assistant Advocate General representing the State and scanned through the record, with their valuable assistance.

**5.** Record reveals that the accused appellant, after having been booked in the instant case, was tried by the learned Judge Special Court / Additional Sessions Judge-II, Karak and on conclusion of the trial, the learned trial court arrived at the conclusion that the prosecution has successfully brought home charge against the appellant / accused, as such, the Court was pleased to convict him for the charges vide the impugned judgment. The appellate Court shall examine as to whether the learned trial court appreciated the evidence so furnished in its letter & spirit and as to whether the impugned judgment is the outcome of application of judicial mind to the facts and circumstances of the case. There is no denial of the fact that under the *ibid* Act, stringent punishments are provided for the offences thereunder and when the punishment is severe, then the prosecution is equally burdened to prove the charges to the

hilt. In the present case, the prosecution examined as many as 08 witnesses and to ascertain as to whether the learned trial judge was justified to convict the appellant, the Court felt it essential to revisit and re-appreciate the evidence once appreciated, so that miscarriage of justice could be avoided.

**6.** The prosecution case as set up is that on 21.08.2021 at about 17:00 hours, complainant Qabil Khan SHO (PW-06) accompanied by police contingent had installed / improvised barricade at Kamran Shaheed Chowk, when a person having two cartons in his hands, on his way from Tabbi side, was noticed and stopped being suspected. The cartons in his possession were searched on the basis where 10 / 10 packets containing Charas were recovered from the same. After weighment, the Charas came out 24280 grams in *toto*. Out of the recovered contraband, sample parcels weighing 05 / 05 grams were separated from each packet and sealed in separate parcels for chemical analysis, whereas, the remaining quantity was packed and sealed separately vide recovery memo Ex.PW-6/2. The complainant being the star witness was examined as PW-06, who stated that on the day of incident, while on barricade duty, he noticed the accused appellant with cartons in his hands; that the accused appellant after being suspected was stopped and the cartons were searched wherefrom the contraband in shape of 10 / 10 packets of Charas were

recovered; that out of each packet, he separated sample parcels of 05 / 05 grams for the purpose of chemical analysis at FSL, which he packed & sealed in parcels No.1 to 10 and 12 to 21 respectively, whereas, the remaining quantity was packed and sealed in separate parcels No.11 and 22 respectively; that he arrested the accused appellant and issued his arrest card and also drafted & prepared the *murasila*, it was sent to Police Station through constable Muhammad Arif # 380 and that on arrival of Investigating Officer to the spot, he pointed him out the site plan as also the recovered stuff. This witness was cross-examined by the defense, but nothing detrimental to the prosecution case could be extracted from his mouth. The witness was examined regarding his arrival at the spot, the manner in which the accused appellant was apprehended and the mode of recovery from his direct possession but he remained firm and consistent on material facts & circumstances. In order to ascertain as to whether the complainant was telling the whole truth and as to whether the incident occurred in the mode, manner and the stated time, the Court feel it essential to go through the statement of Naseer Iqbal (PW-08), who was present with complainant at the time and place of recovery and that in his presence, the recovery was effected from the possession of accused appellant. This witness was cross-examined on material aspects of the case, but he

remained categoric to what the complainant stated and supported the contents of recovery memo Ex.PW-6/2. The witness supported the mode and manner in which the accused appellant was stopped and the process of search, seizure and arrest was carried out followed by separation and sealing of the parcels on the spot. The witness disclosed all the events in the manner it occurred right from the beginning till the end. The deposition made by this witness is natural and completely in line with version of the prosecution case. The police official, who transmitted the murasila report from spot to the PS and the one, who incorporated its contents in the shape of FIR Ex.PA, were produced and examined as PW-04 and PW-05 respectively. The latter being the carrier of *murasila*, testified that it was he who took the same from spot to the PS where he handed it to the former, whereas, the former having registered the FIR soon on receiving the murasila, testified in that respect. Both these witnesses remained firm & consistent as far as transmission of murasila, its receipt and incorporation of its contents in shape of FIR are concerned.

7. The investigating officer was examined as PW-03, who, *inter alia*, stated that after receiving copy of the F.I.R, he visited the spot where he prepared the site plan on pointation of complainant as also the recovery memo Ex.PW-2/1 duly attested by marginal witnesses. The witness further stated that

he placed on file copy of daily diary pertaining to their departure from, and arrival at, the police station in connection with investigation and also the FSL report Ex.PZ regarding the result of stuff recovered. The investigating officer was cross examined on material aspects of the case, but his testimony could not be shattered and he remained categoric to the factum of contraband being recovered from the accused appellant by the complainant and the process of investigation which he carried out. Muharrir of the police station was examined as PW-01, who affirmed that it was he who sent through constable Rahim Ullah No.467 the case property to FSL after making its entry in Register No.19, maintained for the purpose. Similarly, constable Rahim Ullah No.467 was examined as PW-07, he too, while affirming the deposition made by PW-01, stated that it was he, to whom the sample parcels alongwith application and route certificate were handed over by Muharrir for transmission to FSL Peshawar, which he accordingly transmitted and on return, handed over to Muharrir of the police station route certificate duly stamped by the concerned official of FSL Peshawar. The two were subjected to lengthy cross examination, but they remained in harmony with each other as far as the date, time and mode & manner of transmission and handing over of the parcels to the concerned official at FSL are

concerned and nothing detrimental could be brought out from their mouth.

**8.** All the witnesses have narrated the episode in a straightforward manner and remained consistent as regards the mode & manner in which the accused appellant was arrested, the process of search and seizure which was carried out, weighment of contraband and separation of samples from the packets coupled with its sealing in separate parcels, arrival of investigating officer to the spot and the proceedings he conducted. Keeping in view the consistency in the testimony of prosecution witnesses in juxtaposition with the collected evidence vis-à-vis the peculiar facts & circumstances, the prosecution has not only been successful in proving the factum of recovery, right from the beginning till the end, but has also been successful in proving safe custody of the recovered contraband and its safe transmission to the Forensic Science Laboratory, where the report Ex.PZ was received in positive and as such, it has further strengthened the case of the prosecution. It is pertinent to mention that the recovery was effected on 21.08.2021, whereas, the sample parcels were sent to, and received by, the laboratory on 24.08.2021, so for all intents and purposes, the requirement of Rule-4 of the Control of Narcotic Substances (Government Analysts) Rules, 2001 pertaining to dispatch of sample parcel to the laboratory within

72 hours, which, though is directory in nature, but even then stood fulfilled.

**9.** Though, it was agitated time and again that safe custody of the recovered contraband has not been proved, but we are not convinced. As stated above, we have before us the testimony of Muharrir of the police station who was examined as PW-01 and the constable who transmitted the sample parcels to the FSL as PW-07. The witness deposed in a straightforward manner that he took out the sample parcels from Maal Khana and sent the same through Constable Rahim Ullah No.497 (PW-07), who too affirmatively deposed in that respect. While substantiating safe custody, the witness made reference to entry made in Register No.19, which is available on file as Ex.PW-3/5. This piece of evidence supports the version of PW-01 with regard to safe custody. The defence failed to cross examine the witness either regarding the safe custody or the entry made in Register No.19 in that respect. As the witness was not cross examined on material point, so the provisions of Article 133 of the Qanun-e-Shahadat Order, 1984 can be pressed into service and as such, this aspect of the case would be deemed to have been admitted by the defence. Wisdom could well be derived from the law laid down in the case of ***"Muhammad Rafiq Vs Abdul Aziz" (2021 SCMR 1805 Supreme Court)*** wherein it has been held that:

***"It is settled that a material point of statement of a witness which is not cross-examined is deemed to have been admitted by the other side."***

**10.** Besides, the case property was duly deposited in Maal Khan by Muharrir of the police station on the same day, the same fact is evident from daily diary dated 21.08.2021 (Ex.PW-3/4). The Muharrir while appearing as PW-01 too affirmed in his cross examination that it was the complainant, who handed him over the case property on the day of recovery. Though, learned counsel for the appellant attempted to harvest the reap of omission on part of complainant to hand over the case property to the investigating officer on the spot after his arrival, but we cannot ignore that on one hand, the factum of recovery has otherwise been proved to the hilt, whereas, on the other, the prosecution has successfully proved safe custody of the recovered contraband coupled with its timely transmission to the FSL, so such omission at the most can be interpreted to be inefficiency of both the complainant to hand it over and the investigating officer as well, to take the same on spot. There is no cavil to the proposition that when guilt of accused person is otherwise proved through confidence inspiring evidence, then mere inefficiency on part of investigating officer could not be taken a sole ground for acquittal, that too, in a case involving

such a huge quantity of narcotics. We cannot ignore that the menace of drug addiction is a potential threat to our society, as it adversely affects the lives of many innocent youngsters and as such, keeping in view the huge quantity so recovered, it can never be denied that such quantity was solely meant for the purpose of sell. The Legislature keeping before the increasing tendency of this evil was conscious enough to bring about legislative strictness in the form of the 2019 Act, so the offenders booked under the Act must be combated with judicial response and no benefit on account of such inefficiency on the part of law enforcement agency can be extended to them, more particularly, when the factum of recovery and safe custody is overwhelmingly proved as is the case before us. The submission of learned counsel for the appellant, thus, merits no consideration and is discarded as such. It is pertinent to mention that the defense could not bring on record that what *mala fide* either the complainant or the investigating officer or even any other police official had against the accused appellant to falsely charge him for commission of the offence. Even otherwise, element of *malafide* or false implication, that too, in a case involving such a huge quantity is out of the question, because the accused appellant belongs to District Khyber, whereas, the recovery was effected from his direct possession in District Karak. The appellant has badly failed to establish to the

contrary the very purpose of his presence at the place of recovery.

**11.** Learned counsel for the appellant referred to some minor discrepancies in the statements of the witnesses, but the same being trivial, cannot be pressed into service to dislodge the trustworthy account furnished by the prosecution witnesses on one hand, and the inherent worth of the collected material, on the other. It cannot be ignored that the witnesses tasted the test of cross examination after a considerable period of the date of recovery, so the minor contradictions with regard to the timings, or the exact number of police officials, who accompanied the complainant or the investigating officer, as the case may be, were bound to occur, because it cannot be denied that police officials conduct the like proceedings on day to day basis and as such, it would be unnatural to expect them to disclose in each and every such case with exactitude the timings or the number of officials accompanying the complainant or the investigating officer. Besides, under the criminal administration of justice, minor contradictions or discrepancies, which do not go deep to the roots of a particular case, cannot be made sole ground for acquittal, more particularly, when guilt of accused person is otherwise established on record. The reason behind is that if such irrelevant contradictions or discrepancies is given much importance and are taken into consideration sole ground,

then there would be hardly any conviction in criminal cases, which has never been the intent and purpose behind appreciation of evidence under the criminal administration of justice. The Apex Court in the case of ***"Shamsher Ahmad and another Vs The State and others" (2022 SCMR 1931)*** has held that:

> ***"While appreciating the evidence, the court must not attach undue importance to minor discrepancies and such minor discrepancies which do not shake the salient features of the prosecution case should be ignored. The accused cannot claim premium of such minor discrepancies. If importance be given to such insignificant inconsistencies then there would hardly be any conviction."***

**12.** The cumulative effect of what has been stated above leads this Court nowhere, but to hold that the prosecution has fully succeeded in bringing home guilt against the appellant. The evidence on file has properly been appreciated and the learned trial Court, in the circumstances, was right to convict the appellant. Learned counsel for the appellant has failed to point out any illegality or irregularity, or misreading or non-reading of any material piece of evidence in the impugned

judgment, rather the record speaks otherwise and the reasons given by the learned trial judge find complete support from record of the case, as such, no interference is called for. Consequently, the instant criminal appeal being bereft of any merit is hereby dismissed.

***Announced***
*04.04.2023*
(Ghafoor Zaman)

***Date of writing of judgment:***
**4th of April, 2023**

**JUDGE**

**JUDGE**

*(D.B)*
*Hon'ble Mr. Justice Sahibzada Asadullah*
*Hon'ble Mr. Justice Shahid Khan*

07 APR 2023