

PESHAWAR HIGH COURT, BANNU BENCH.

[Judicial Department].

Cr.A No.96-B of 2022

Imtiaz Ali Khan

Vs.

The State

JUDGMENT

Date of hearing 19.10.2022.

Appellant-Petitioner M/s. Imran Ali Shah Mandan & Abid
Anwar Khattak, Advocates.

Respondent /State by: Mr. Qudrat Ullah Khan Gandapur,
Asstt: AG.

SHAHID KHAN, J.- Imtiaz Ali Khan, the convict/appellant has called in question his conviction & sentence recorded by the learned Additional Sessions Judge/Judge Special Court, Takht-e-Nasrati, Karak in case F.I.R No.559, dated 24.8.2020 under section 9-D Khyber Pakhtunkhwa CNSA 2019 of police station Y.K.S Takht-e-Nasrati, District Karak.

2. It so happened, Bego Khan SI on public complaints against convict/appellant regarding his involvement in the business of narcotics & smuggling, on the fateful day, time & place he received information about presence of the accused in his baitak and that he had made plan to smuggle huge quantity of narcotics/chars to the Province of Punjab. The complainant along with his team rushed to the spot under the supervision of DSP Takht-e-Nasrati. On sight of the police party, the accused lifted a sack and tried to flee away from the

scene of occurrence, however, he was apprehended and his body search led to the recovery of one .30 bore pistol without number along with fixed charger containing 4 live rounds of the same bore from the folder of his Shalwar. On checking the sack, 08 packets of chars wrapped with yellow scotch-tap were recovered. On weighment, each packet came out to be 1000 grams, total 8000 grams chars. Samples were drawn from each packet for its analysis, sealed in parcels and the remaining stuff was sealed in separate parcels accordingly.

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3. On completion of the investigation the matter was sent up for trial and the learned trial Court after recording the evidence of the prosecution followed statements of accused, heard the learned prosecutor and learned defence counsel, whereof, arrived at the conclusion that the prosecution has brought home charge against the accused, as such, convicted & sentenced accused Imtiaz Ali Khan under section 9-d KP CNSA for life imprisonment with fine in the sum of Rs.5,00,000/- or six month S.I in default.

4. It obliged the convict/ accused Imtiaz Ali Khan to approach this Court through subject appeal.

5. Learned counsel for the appellant is focal and consistent on the proposition that evidence on record has not been properly appreciated by the learned trial Court. Added, the PWs have made dishonest improvements in their Court's

statements and also materially contradict each other but the learned trial Court ignored the contradictions and fall into an error by not extending the benefit of doubt to the appellant. Further added, the prosecution witnesses are divergent in their respective accounts regarding the mode & manner of the recovery in question. Also added, being *abadi deh*, availability of the independent persons on the scene of occurrence could no way be ruled out but none from the general public has been cited as witness to the recovery proceedings. Further added, the exercise of drawl of samples followed by the sealing process is not in accordance with the law on subject. Also added, the prosecution has failed to prove safe transmission of the samples to the F.S.L. Concluded, the learned trial Court has fallen in error as not to highlight the material contradictions coupled with the infirmities in the prosecution's evidence which creates a reasonable doubt in a prudent mind and the accused as a matter of right deserve his acquittal by extending the benefit of doubt to him.

6. Conversely, learned A.A.G rebutted the contentions & stance of the learned counsel for the appellant and highlighted loud & clear that the occurrence is the outcome of prior information to the seizer officer and the recovery has been affected from baithak of the convict/appellant in the presence of marginal witnesses. Added the account of the seizer officer and marginal witnesses to the recovery

proceedings is direct and consistent on the material points as drawl of samples from each & every packet followed by sealing the samples and the remaining stuff accordingly. Also added that the seizer officer and the marginal witnesses to the recovery proceedings have faced the searching examination-in-cross of the learned defence counsel but nothing as such could be extracted from their mouths which could be made as base even for the slight doubt in respect of the bid to be foiled. Went on to argue the samples so transmitted for its analysis to the F.S.L were being under the escort of a police official in sealed condition followed by its safe transmission to the F.S.L, whereof, found to be in sealed condition, as such, a remote chance of replacement or otherwise can be excluded. The evidence so furnished is direct & consistent on the material points and the learned trial Court has appraised the same in a logical & legal manner. The learned trial Court has explained each & every act right from the raid followed by the interception of the accused and recovery of the stuff as well as the recovery proceedings, drawl of samples, its positive F.S.L report and ended in the conviction of the accused through a comprehensive judgment, therefore, the same does not need any interference at all and the subject appeal is worth dismissal.

7. Close perusal of the impugned judgment of the learned trial Court coupled with the analysis of the evidence so recorded would transpire that after the exercise of the seizure

and arrest of the convict/appellant, exercise of required documentation was carried on the spot and the murasila was transmitted to the police station for the registration of the event. The alleged narcotics as charas was recovered from the convict/appellant on 24.8.2020 while the samples so drawn were received to the F.S.L through FC No.258 on 26.8.2020. The complainant during statement as PW-2 stated that he drafted application to F.S.L Ex.PW2/3. The statement of the complainant is silent as to whether he had handed over the case property to the investigation officer or Muharrir of the police station. Maqsood Khan, retired SI (PW-6) during cross-examination admitted that the case property and accused were not handed over to him by the seizing officer on the spot. He further admitted that accused and seizing officer were present in the police station on his return. The F.S.L report available on file reveals that the samples were taken to the F.S.L by FC No.258, however, neither the said official, nor Muharrir of the concerned police station were examined by the prosecution during trial. By now it is settled that the prosecution is duty bound to prove the recovery of narcotics, then the separation of samples and sending of the samples through safe hands and any violation on the part of the prosecution would go to the roots of the case of the prosecution. More so, register No.19 has not been produced during trial. Irrespective of the fact that the samples and the stuff might be in the safe hands and



question of replacement or otherwise may not strike the prudent mind but it shall not skip the attention of the Court that the subject irregularity and illegality is not curable at all and it touches roots of the prosecution's case for the simple reason that replacement or otherwise could no way be ruled out. In this regard reliance is placed on the case titled **"The State through Regional Director ANF Vs. Imam Bakhsh and others" (2018 SCMR 2039)** wherein it has been held that:-



"We have heard the learned counsel for the parties and have gone through the record with their assistance. At the very outset, it is observed, that the controversy in these cases revolves around the consequence of non-compliance of Rules 5 and 6 of the Rules. In other words, whether the said Rules are mandatory or directory and whether non-compliance of these Rules invalidates the Report of the Government Analyst. Another overlapping ground in some cases has been the lack of safe custody and safe transmission of the recovered substance from recovery till its receipt by the Narcotics Testing Laboratory.

Chain of Custody - Safe custody and safe transmission

9. We have noted above that in Criminal Appeals Nos. 523 to 525/2017 and No. 22/2018, safe custody and safe transmission of the alleged drug from the spot of recovery till its receipt by the Narcotics Testing Laboratory are not satisfactorily established. The chain of custody begins with the recovery of the seized drug by the Police and includes the separation of the representative sample(s) of the seized drug and their dispatch to the Narcotics Testing Laboratory. This chain of custody, is pivotal, as the entire

construct 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, unsuspicious, 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. This Court has already held in Amjad Ali v. State (2012 SCMR 577) and Ikramullah v. State (2015 SCMR 1002) that where safe custody or safe transmission of the alleged drug is not established, the Report of the Government Analyst becomes doubtful and unreliable.

8. The record is silent regarding the protocols of drawl of samples followed by its safe custody and its transmission to the FSL for analysis, the very inception of the case of the prosecution is tainted with doubts. It is indeed settled that the prosecution is under obligation to establish the safe custody of the samples strictly in accordance with law. The august Apex Court in case titled, “**Mst. Sakina Ramzan Vs. The State**” reported in **(2021 SCMR 451)**, held that:-

“The chain of custody or safe custody and safe transmission of narcotic drug begins with seizure of the narcotic drug by the law enforcement officer, followed by separation of the representative samples of the seized narcotic drug, storage of the representative samples and the narcotic drug with the law

enforcement agency and then dispatch of the representative samples of the narcotic drugs to the office of the chemical examiner for examination and testing. This chain of custody must be safe and secure. This is because, the Report of the Chemical Examiner enjoys critical importance under CNSA and the chain of custody ensures that correct representative samples reach the office of the Chemical Examiner. Any break or gap in the chain of custody i.e., in the safe custody or safe transmission of the narcotic drug or its representative samples makes the Report of the Chemical Examiner unsafe and unreliable for justifying conviction of the accused. The prosecution, therefore, has to establish that the chain of custody has been unbroken and is safe, secure and indisputable in order to be able to place reliance on the Report of the Chemical Examiner."

9. Reliance is also placed on the judgment of august Apex Court titled "**Ishaq Vs. The State**" (2022 SCMR 1422), wherein it is held that:-

(b) Control of Narcotic Substances Act (XXV of 1997)---

---S.9--- Possession of narcotics--- Prosecution failing to establish safe custody and safe transmission of samples from the police to the Forensic Science Laboratory---In a case containing the said defect on the part of the prosecution it cannot be held with any degree of certainty the prosecution had succeeded in establishing its case against an accused person beyond any reasonable doubt."

10. Beside above, there are material contradictions in the evidence so furnished which damage the case of

prosecution case. Complainant (PW-2) stated in his examination-in-chief that he arrested the accused vide card of arrest Ex.PW2/2 and drafted murasila Ex.PA/1 on the spot and sent the same through constable Asif No.682 for registration of F.I.R but contrary to the above, PW-7 namely Asif Rehman No.682 during examination-in-cross admitted that the S.H.O had also handed over to him case property along with murasila report which he delivered at police station. Similarly, Fakhar Zaman No.656 (PW-3) during examination-in-cross stated that his statement under section 161 Cr.P.C was recorded by the I.O on the spot, however, this portion of his statement was contradicted by the I.O (PW-6) who during examination-in-cross admitted that he prepared site plan Ex.PB at the instance & pointation of complainant and thereafter he returned to police station where he recorded the statement of complainant and other witnesses under section 161 Cr.P.C.

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11. It is cardinal principle of Criminal Justice that every individual is presumed to be innocent, unless proved guilty. It is the bounden duty of the prosecution to prove its case beyond any shadow of doubt and if any reasonable dent or doubt is found in prosecution case, the benefit of the same is to be extended to the accused, not as a matter of grace or concession but as a matter of right. The cardinal principle of criminal administration of justice is based on the concept of justice in Islam which is to be observed more consciously and

carefully. Benefit of doubt of features appearing in the case invariably, are required to be given full effect while deciding the ancillary matters in a criminal case. Benefit of doubt, if any, favourable to the accused cannot be withheld in the exercise of discretion of the Court.

12. The prosecution is not only duty bound but under obligation to substantiate its case beyond any reasonable doubt and even a single or slightest doubt is floating on surface of the record, its benefit has to be extended to the accused not a matter of grace but as a matter of right and it would be sufficient enough to discredit the prosecution's story. It is well embedded principle of criminal justice that there is no need of so many doubts in the prosecution's case rather a single reasonable doubt arising out of the prosecution evidence, pricking the judicial mind is sufficient for acquittal of the accused. Reliance is placed on a case law "**Tariq Parvez Vs. The State**" (1995 S C M R 1345). The same principle has been reiterated by the Hon'ble Supreme Court in case of "**Muhammad Akram Vs. The State**" (2009 S C M R 230).

13. There is no second opinion about the fact that the cardinal principle of justice always laid emphasis on the quality of evidence which must be of first degree and sufficient enough to dispel the apprehension of the Court with regard to the implication of innocent persons alongwith guilty one by the

prosecution, otherwise, the golden principle of justice would come into play that even a single doubt if found reasonable would be sufficient to acquit the accused, giving him/them benefit of doubt because bundle of doubts are not required to extend the legal benefit to the accused. In this regard, reliance is placed on a view held by the Hon'ble Supreme Court in the case of "Riaz Masih alias Mithoo Vs. State (NLR 1995 Cr.SC 694)).

14. The accumulative effect of the above discussion is that the prosecution has miserably been failed to prove the case against the accused beyond shadow of doubt, therefore, the instant appeal is allowed and accused/appellant is acquitted of the charges levelled against him. He be set free forthwith, if not required in any other criminal case.

These are the detailed reasons of our short order of even date.

Announced:
Dt: 19.10.2022
Ihsan/P.S



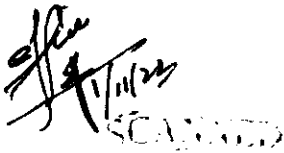
JUDGE



JUDGE

(D.B)

Hon'ble Mr. Justice Sahibzada Asadullah &
Hon'ble Mr. Justice Shahid Khan.



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