

Judgment Sheet

IN THE PESHAWAR HIGH COURT,
PESHAWAR.

JUDICIAL DEPARTMENT**Criminal Appeal No.1123-P of 2022**

1. **Hassan Shah alias Choudhry s/o Haji Ahmad r/o Ghareeza, Jamrud, District Khyber.**
2. **Arif Ullah s/o Haji Ayub r/o Bara District Khyber.**

Versus

The State through Advocate General, Khyber Pakhtunkhwa.

JUDGMENT

Date of hearing: 27.02.2023.

Malik Mushtaq Ahmad, Advocate, for the appellants.

Mr. Muhammad Inam Khan Yousafzai, AAG, for the State.



ISHTIAQ IBRAHIM, J.- This single judgment in the instant criminal appeal (No.1123-P/2022) filed by appellants, namely, Hassan Shah alias Chaudhry and Arif Ullah, is also directed to dispose of the connected criminal appeal No.1147-P/2022 titled "Hakeem Khan Vs The State", as both the criminal appeals emanates against the judgment dated 31.10.2022 of learned Sessions Judge-II/Judge Special Court, District

Khyber, whereby, the appellants were convicted and sentenced as under;

- i. *Appellant Hassan Shah was convicted under section 9-D & 11-C of Khyber Pakhtunkhwa Control of Narcotics Substances Act, 2019 and sentenced to 04 years RI with fine of Rs.500,000/- and Fourteen (14) years RI with fine of Rs.700,000/- and in default of payment of fine to undergo further simple imprisonment for the period of 06/06 months.*
- ii. *Appellant Arif Ullah was convicted u/s 11-C of Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019, and sentenced to Fourteen (14) years RI with fine of Rs.700,000/-and in default of payment of fine he shall further undergo 06 months SI.*
- iii. *Appellant Hakeem Khan was convicted u/s 11-B of Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019, and sentenced to Ten (10) years RI with fine of Rs.500,000/- and in default of payment of fine he shall further undergo 06 months SI.*
- iv. *Benefit of section 382-B Cr.P.C was extended to the appellants-convicts. It was also ordered by the learned trial Court that the sentences awarded to the appellant-convict Hassan Shah shall run concurrently.*
- v. *The accused-appellants were acquitted under section 13-KP CNSA & 15-AA while extending them the benefit of doubt.*

2. Brief facts of the case are that complainant Rehman Sher Khan SI alongwith other police officials were present on routine patrolling and received spy

information that one Hassan Shah alias Chaudhry alongwith other companions are engaged in supply of ICE and heroin to youngsters. Upon the information they raided upon *Adda* of Hassan Shah and on seeing the police party, accused tried to decamp from the spot, however, all the persons were overpowered. On cursory interrogation one of the accused disclosed his name as Hassan Shah alias Chaudhry who was carrying a shopping bag. On search of the same 01 packet ICE and 01 packet heroin were recovered, on weighment it came out 1100 and 1300 grams respectively. Moreover, on his personal search ICE was recovered from his side pocket, on weighment it came out 200 grams. Similarly, the other accused disclosed his name as Arif Ullah, who was carrying a shopping bag, upon search 01 packet ICE was recovered, on weighment it came out 1050 grams, upon his personal search 200 tokens ICE were recovered from his side pocket, on weighment it came out 100 grams ICE. The third person disclosed his name as Hakeem Khan, from his possession one pistol alongwith 05 live rounds and 150 tokens ICE were recovered, on weighment it came out 150 grams. The

seizing officer also took into possession, one mixture, one digital scale and three motorbikes from the spot. The representative samples separated from the recovered stuff, sealed into separate parcels, while remaining contrabands were sealed into parcels by affixing "HM" monogram. The seizing officer prepared the recovery memo Ex.PW4/1. The complainant prepared *murasila* Ex.PW4/4 and sent the same to the Police Station through Constable Bakht Munir for registration of the case, on the basis whereof FIR Ex.PA was registered.

3. After completion of investigation the prosecution submitted complete *challan* against the accused. The accused was summoned, who were produced in custody and the provisions of section 265-C Cr.P.C were complied with. Formal charge against the accused was framed to which they pleaded not guilty and claimed trial.

4. During trial, the prosecution examined as many as Six (06) witnesses. Statement of the accused was recorded under section 342 Cr.P.C, wherein, he neither wished to be examined on oath nor desired to produce evidence in his defence. After hearing learned

counsel for the accused and learned Dy.PP for the State, the learned Additional Sessions Judge-II/Judge Special Court, District Khyber, rendered the impugned judgment dated 31.10.2022, thereby, convicting the accused/appellant as mentioned in the first paragraph of the judgment.

5. Hence, the instant Criminal Appeal (No.1123-P/2022) by convict/appellant, namely, Hassan Shah alias Chaudhry and Arif Ullah and connected Criminal Appeal (No.1147-P/2022) by convict/appellant, namely, Hakeem Khan, for their acquittal.

6. Arguments of learned counsel for the appellants and learned AAG heard; and record perused.

7. In this case as referred above the complainant alongwith other police officials were on routine patrol of the area and received information that the appellants are busy in selling of narcotic in their den situated in village *Sam Gara*. Pursuant to information, they raided the said place and the accused-appellants were arrested while they were trying to flee from the spot (place of occurrence) and the contraband narcotics mentioned above were recovered from their possession. It is a matter of record that the place of

occurrence is not a dwelling house rather the same was being used as main supply center of narcotic. The complainant and the other PWs have withstood the test of cross examination and their testimony has remained un-shattered and un-rebutted. The contention of the learned counsel for the appellants that the place of occurrence was raided in violation of section 103 Cr.P.C and warrant under section 27 of the Khyber Pakhtunkhwa Control of Narcotic substances, Act, 2019, was not obtained in this respect from the competent Court of law. Section 31 of the Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019, is reproduced for convenience.

Section 31. Mode of making searches and arrest.---

"The provisions of the Code, except those of section 103, shall, mutatis mutandis, apply to all searches and arrests"

Provided that section 103 of Code shall, in case of search of dwelling house, be strictly observed.

In the above mentioned section it is specifically mentioned that the provision of section 103 Cr.P.C are to be strictly complied with only in case of dwelling house. There is nothing on record to show that the place of occurrence was a dwelling house rather the same as per prosecution was the den of

narcotic. The term “*dwelling house*” has neither been defined in the Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019, nor in the control of Narcotic Substances Act, 1997. For the purpose, reference could be made to *Black’s Law Dictionary* wherein it has been defined as;

“The house or other structure in which person lives; a residence or abode”

(Black’s Law Dictionary, Ninth Edition)

In **London Building Act, 1930**, the same has been defined as;

“Section.5: Dwelling-house. Means a building used or constructed or adapted to be used wholly or principally for human habitation”

In case *Lewin v End*, [1906] AC 299, at p. 304 Lord Atkinson remarked that;

“By a ‘dwelling-house’ I understand a house in which people actually live or which is physically capable of being used for human habitation”

Bare perusal of the above definitions transpire that term ‘*dwelling-house*’ refers to a place or building which is actually and principally used for human residence. Admittedly (admitted by convict/appellants in their statements under section 342 Cr.P.C), the place of occurrence was an *Adda (Den)* not a dwelling-

house. Therefore, non-compliance of the provision of section 103 Cr.P.C would not vitiate the recovery proceedings.

8. Regarding the second objection of the learned counsel for the appellants that warrant u/s 27 of the Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019, was not obtained. It is pertinent to mention here that the information was received to the police while they were on routine patrol and thereafter they straightaway rushed to the place of occurrence. At times law enforcing agencies are left with no choice but to conduct raid for the reason that any sort of delay would give time to the culprits to leave the place of occurrence or to dispose of the incriminating articles. Therefore, in the present situation the raid has been conducted according to law by considering the facts and circumstances of the case. In addition to above, the provision of section 27 of the Khyber Pakhtunkhwa Control of Narcotic Substances, Ac, 2019, and that of the provisions of section 20 & 21 of Control of Narcotic Substances Act, 1997, are almost identical to each other and it has been held by the Apex Court in four-member bench judgment rendered

in case titled "Zafar..Vs..The State" (2008 SCMR 1254)" that these are directory and not mandatory. Furthermore, Section 28 of the Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019, subject to proviso of sub-section 1 of Section 27, empowers authorize officer to enter any building, place, premises, dwelling house or conveyance on receipt of information or knowledge, if he is of the opinion that narcotic substances is kept or concealed, and obtaining search or arrest warrant from the Special Court will give opportunity for concealment of evidence or facility for escape to any person involved in commission of offence. Compliance of proviso of sub-section 1 of Section 27 is also not attracted in the present case. The rationale behind the compliance of the proviso is to preserve privacy and maintain dignity and modesty of women and dwelling house. So the raiding police party acted within the four corners of law. Therefore, in view of this Court the proceedings in question cannot be declared void due to non observance of section 27 of the Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019.

9. It is evident from record that the prosecution has produced material evidence regarding the recovery of contraband ICE and heroin from the possession of the appellants. The seizing officer has appeared as PW-4 whereas one of marginal witness to the recovery memo has appeared as PW-5. PW-2 Moharrir handed over the samples to PW-1, who took the same to FSL for chemical analysis. The FSL report Ex.PZ in respect of the said samples is in positive. It is pertinent to mention that the recovery was effected on 10.08.2021 while the samples were received in the FSL on 11.08.2021 on the very next date of the recovery, therefore, possibility of tempering or manipulation is ruled out. Complainant (PW-4) has stated that he has himself brought the samples of the contraband narcotics to the Police Station and the same were handed over to Tahir Khan Moharrir (PW-2) and the Moharrir has handed over to Constable Abid Ullah (PW-1) for onward transmission to the FSL. Thus, the prosecution in view of this Court was able to establish the recovery of contraband from possession of the appellants. Furthermore, the safe custody and transmission of the samples right from the place of recovery to FSL was also established. Hence the

conviction of the appellants by the trial Court vide impugned judgment is not open to any exception.

10. Moving on to the quantum of sentence awarded to the appellants. The appellants are first offenders and there is nothing on record that they are previously involved in such like cases. There are certain shortcomings and negligible inconsistencies in the evidence which in view of this Court will have bearing on the quantum of sentence only and not on the guilt of the appellants, therefore, conviction of the appellant, namely, Hassan Shah, u/s 9-D of the Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019, is maintained, however, his conviction and sentence under section 11-C of Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019, is reduced from Fourteen (14) years RI to Ten (10) years rigorous imprisonment while the fine amount is maintained under both heads, however, in default of payment of fine he shall further undergo One (01) month SI each head instead of Six (06) months SI. Similarly, the conviction and sentence of appellant, namely, Arif Ullah, under section 11-C of Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019, is also reduced from



Fourteen (14) years RI to Ten (10) years RI while the fine amount is maintained, however, in default of payment of fine he shall further undergo One (01) month SI instead of Six (06) months SI.

11. Likewise, from possession of accused Hakeem Khan 150 sachets/tokens weighing 150 grams ICE were recovered. It is not clear that whether sachets/tokens recovered from the possession of accused-appellant Hakeem Khan were weighed with the sachets/bags or otherwise and the quantity allegedly recovered from his possession is also a borderline between 11-A and 11-B Khyber Pakhtunkhwa Control of Narcotic Substances, Act, 2019. In the circumstances, appellant, namely, Hakeem Khan, is given benefit of doubt in quantum of sentence and his conviction is altered from 11-B to 11-A of Khyber Pakhtunkhwa Control of Narcotic Substances, Act, 2019, and his sentence is reduced from Ten (10) years RI to Three (03) years RI while the fine amount is maintained, however, in default of payment of fine he shall further undergo One (01) month SI instead of Six (06) months SI.

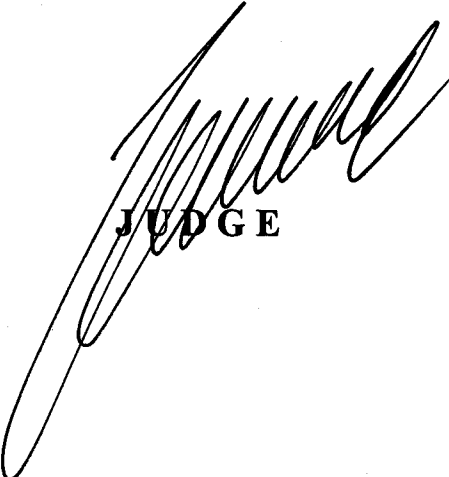
12. Benefit of section 382-B Cr.P.C is also extended to the convicts/appellants. All the substantive sentences awarded the convicts-appellants shall run concurrently.

13. In view of the above, this Criminal Appeal (No.1123-P/2022) and the connected Criminal Appeal (No.1147-P/2022) are partially allowed in the above terms.

Announced.
27.02.2023

(S.B) Hon'ble Mr. Justice Ishfaq Ibrahim.

(M.Iqbal, SSS)


JUDGE