

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
D.I.KHAN BENCH
(Judicial Department)

Cr. Appeal No.20-D/2016

Saeedullah Khan
Vs.
The State

JUDGMENT

Date of hearing: **21.02.2018**

Appellant-Petitioner by M/S Farooq Akhtar Khan and Taj Ali Shah Advocates.

Respondent by Mr. Adnan Ali Khan A.A.G

SHAKEEL AHMAD, J.- Saeedullah Khan son of Gulab Khan caste Kaddi Khel Khattak appellant was tried by the learned Additional Sessions Judge-III/Judge Special Court, D.I.Khan in crime report No. 443 dated 28.11.2014 registered under section 9(c) Control of Narcotics Substance Act, 1997 at police station Saddar, D.I.Khan, he was convicted under Section 9 (c) ibid and was sentenced to imprisonment for life and also to pay a fine of Rs.50,000/- and in default thereof to suffer S.I for two months with benefit of Section 382-B Cr.P.C. Feeling aggrieved, the appellant has filed this Cr. Appeal No. 20-D/2016.

2. The prosecution case as disclosed in the FIR (*murasila*) Ex:PA are that on 28.11.2014 at 16:00 hours, the SHO Haroon Rashid, police station Yarik, D.I.Khan alongwith police party made '*nakabandi*' on

Mufti Mehmood Chowk at D.I.Khan, a coaster bearing No.3999 coming from Peshawar side was stopped by the police for checking, constable Sami Ullah Pw-4 and official driver Din Muhammad PW-1, checked coaster and found the appellant seated in the coaster and recovered a black bag laying beneath his foot. On query, he disclosed his name as Saeedullah Khan son of Gulab Khan, and claimed ownership of the bag in question. He was deboarded from the coaster, on search of his bag, 07-packets of opium and 04-packets of heroin wrapped with solution tap were recovered. On weighing, each packet opium contained 1200 grams opium and each packet of heroin contained 100 grams heroin and on the remaining 02-packets contained 500 grams heroin. The contraband were took into possession vide recovery memo Ex:Pw-4/1, out of the said quantity of opium and heroin, 05 grams each were sealed into parcel and sent to the chemical examiner for analysis and whose report tendered as Ex:Pw-5/1 confirmed the contents to be that of opium and heroin.

3. After completion of investigation, the appellant was challan to face the trial, he was charged under section 9 (c) CNSA, 1997, to which, he pleaded not guilty and claimed trial.

4. The prosecution produced Din Muhammad, Driver PW-1, Haroon Rashid, Inspector,

Ameer Taimoor PW-2, Head Constable PW-3, Sami Ullah Constable, PW-4 and Abdul Latif PW-5 who investigated the case. After closure of prosecution evidence, the accused was examined under section 342 Cr.P.C, wherein he denied the allegations put forth by the prosecution, but he neither wished to be examined on oath under section 340 (2) Cr.P.C nor did adduce any defence. On the conclusion of the trial, the appellant was convicted and sentenced as stated above.

5. It is, inter alia, contended by the learned counsel for the appellant that the appellant is innocent and has falsely been implicated in the instant case; that nothing incriminating articles were recovered from the personal possession of the accused; that the case property (contraband) was neither produced nor exhibited by the prosecution, which is fatal to the prosecution case; that the bag in question was recovered by PW-1 and PW-4, but PW-1 is neither the witness of the recovery memo nor attested the same; that the prosecution has failed to prove the recovery of alleged contraband from the possession of the accused beyond a ray of doubt, therefore, the conviction and sentence recorded by the learned trial court is not sustainable in the eye of law; that neither the driver nor the conductor of the coaster in question were examined to show that the accused was travelling in the coaster in question.

6. Conversely, the learned Additional Advocate General appearing on behalf of the State argued that the appellant was found seated in the coaster in question and he himself claimed ownership of the bag and in its presence recovery of contraband was made from the bag laying beneath his foot; that police has got no ill-will or enmity to implicate him in a false case; that samples of contraband were sent to the FSL and its report was received in positive; that the prosecution has proved its case against the appellant beyond a shadow of doubt, therefore, he was rightly convicted and sentenced and lastly prayed for dismissal of the appeal.

7. We have heard the arguments of the learned counsel for the parties and have perused the record with the able assistance of the learned counsel for the parties.

8. Perusal of the record reflects that the prosecution case rested upon the recovery of opium and heroin from the bag laying beneath foot of the appellant/accused who was seated in the coaster bearing No. 3999-LES, affirmative report of FSL Ex.Pw-5/1, statement of Pw-1, PW-2, PW-4 and PW-5.

9. We find that as per allegations disclosed in the *murasila* the 07-packets of opium wrapped in solution tap each packet contained 1200 grams, 02-packets heroin each contained 100 grams, 02-packets

each contained 500 grams were recovered from the bag allegedly laying beneath the foot of the appellant who were seated in the coaster, but nothing was mentioned in the *murasila* Ex.PW2/1 to show that sample of 05, 05 grams of opium and heroin were separated for the purpose of chemical examiner analysis, therefore, it cannot be said that the samples which were sent to the chemical examiner for analysis were the sample of this case or some other case, therefore, genuineness of this report in these circumstances is not free from doubt and it is not safe to rely upon the same.

10. The marginal witnesses of the recovery memo Ex.PW-4/1, whereby the contraband in question were taken into possession were examined as PW-2 & Pw-4. They did not utter even a single word about separation of the samples from the recovery of contraband for the purpose of chemical examiner analysis though the same is mentioned in the recovery memo. It was alleged in the initial report recorded in shape of *murasila* Ex:PW-2/1 that the coaster was checked by official driver Din Muhammad and constable Sami Ullah and the date of recovery of report as given in the FIR is 28.11.2014, however, when the said Din Muhammad was examined as PW-1, he stated that he was present with the SHO on *Nakabandi* at Mufti Mehmood Chowk, Bypass road, D.I.Khan on

29.11.2014 which date is one day after the recovery. PW-1 & PW-4 stated in their examination-in-chief that the bag in question was laying beneath the leg of the appellant while PW-2 Haroon Rashid, SHO stated that the accused was seated in the coaster and beneath his seat a black color bag was laying and did not say even a single word that the accused claimed its ownership and the same is position in the statement of PW-1 & Pw-4.

11. The case property i.e recovered narcotics were neither exhibited nor produced before the trial court, which is the best evidence of the prosecution against the appellant. The non-production of the case property in the court is fatal to the prosecution case and destroyed its very foundation. In this respect, reliance can be placed on the case titled **Abrar Hussain V. The State (2017 P.Cr.L.J 14) Lahore** wherein it was held as under:-

S.9(c)..... Possession, import or export, or financing of trafficking of narcotics..... Appreciation of evidence..... Non-production of case property before court.....effect Material contradictions existed in the evidence available on the record..... Case property had not been produced by the police before the trial court without any justification, which showed that the police had malice towards the accused regarding recovery of the contraband.... Production of the case property before the court was the primary duty of the police in order to bring home the guilt of the

accused....Non-production of the case property was fatal to the prosecution's case, and the same had destroyed the very foundation of the case.

In this respect reliance may also be made from the judgment of this Court reported as **Muhammad Fiaz V. The State (2017 PLD 74) Peshawar.**

12. For what has been discussed above, we hold that the prosecution has miserably failed to establish its case against the appellant beyond a ray of doubt, therefore, this appeal is accepted and the conviction and sentenced recorded under section 9(c) CNSA, 1997 is set aside and the appellant/accused is acquitted of the charges. The accused is in Jail, he is directed to be released forthwith if not required in any other case.

Announced.
Dt: 21.02.2018
*Hasnain/**

JUDGE

JUDGE

(D.B)

Hon'ble Mr. Justice Ijaz Anwar
Hon'ble Mr. Justice Shakeel Ahmad