JUDGMENT SHEET

PESHAWAR HIGH COURT
MINGORA BENCH
(*Judicial Department*)

(1) **Cr.A No. 303-M/2023**

Sabir Shah son of Said Shah Zaman.....(Appellant)

V/S

The State & another.....(Respondents)

&

(2) **Cr.A No. 302-M/2023**

Saeed-ul-Ibrar son of Said Bahadar.....(Appellant)

V/S

The State & another.....(Respondents)

Present: Mr. Sajjad Anwar, Advocate, for the accused/appellants.

Hafiz Ashfaq Ahmad, Asst:A.G, for the State.

Date of hearing: 27.11.2023

JUDGMENT

SHAHID KHAN, J.- Through this single judgment, the Court intends to decide the subject criminal appeal No. 303-M of 2023 titled ***" Sabir Shah v/s The State & another"*** coupled with the connected Criminal Appeal No. 302-M of 2023 titled ***" Saeed-ul-Ibrar v/s The State & another"***, as the subject criminal appeals are by-product of one & the same impugned order/judgment, passed by the learned Additional Sessions Judge/Model Criminal Trial Court, Malakand at Batkhela, dated 28.09.2023, whereby, on conclusion of trial, the learned trial Court convicted & sentenced the appellant/accused U/S 9 (d), Khyber Pakhtunkhwa Control of Narcotic

Substances Act, 2019 and awarded him a sentence for rigorous imprisonment of five years with fine in the sum of Rs. 1000,000/- (one million), in default whereof, to suffer further six months SI. Benefit of section 382-B Cr. P.C has also been extended to the accused/appellant. Whereas, through connected criminal appeal, claimant/ appellant sought the permanent custody of the motorcar in question which was confiscated in favour of the State.

2. Reportedly, the complainant/ Post Commander, Hassan Khan Shaheed, Levy Post Alladhand received prior information in respect of smuggling of huge quantity of narcotics through Suzuki Pickup No. Ai-1770. Acting on such information, he, with other levy officials named in the FIR laid a picket (*Nakabandi*) and the stopped the aforesaid vehicle for the purpose of checking. Driver of the vehicle disclosed his name as Sabir Shah (the accused/appellant herein). During search of the vehicle, the levy officials recovered a blue colour bag, lying beneath the legs of the driver. Due search of the bag led to the recovery of narcotic as Chars net weighing 3044 grams

(comprising of three packets). The event was reduced into in writing in the shape of *'Murasila'* (Ex. PW-PA/1) followed by FIR No. 10 (Ex. PW-PA) dated 01.02.2023 registered against the accused/appellant, U/S 9 (d), K.P CNSA, Act, 2019 at P.S/Levy Post, Hassan Khan Shaheed, Alladhand, District Malakand.

3. Upon arrest of the accused/appellant followed by preliminary investigation on the spot, after drawl of sample from the relevant bag, sealed the same in separate parcels as well as the remaining stuff and the *'Murasila'* was sent to the P.S/Levy Post concerned.

4. On completion of the investigation, *challan* was drawn and was sent-up for trial to the learned trial Court. Accused was confronted with the statement of allegations through a formal charge-sheet to which he pleaded not guilty and claimed trial.

5. To substantiate the guilt of the accused/appellant, the prosecution placed reliance on the account five (05) PWs. The accused was confronted with the evidence so

furnished through statement of accused within the meaning of section 342 Cr.P.C.

6. On conclusion of proceedings in the trial, in view of the evidence so recorded and the assistance so rendered by the learned counsel for the accused/appellant and the learned State counsel, the learned trial Court arrived at the conclusion that the prosecution has successfully brought home charge against the appellant/ accused, Sabir Shah, through cogent & worth reliable evidence, as such, the accused was convicted & sentenced (as highlighted in the proceeding Para of this judgment).

7. It obliged the appellant/accused as well as the claimant/appellant to approach this Court through the subject criminal appeals.

8. Arguments of the learned counsel for the accused/appellants as well as the learned Astt: A.G for the State have been heard at a substantial length and the record gone through with their valuable assistance.

9. The record so furnished would divulge that the local levy officials under the command & supervision of the complainant/Post Commander, Noor

Zada laid a picket (*Nakabandi)*, pursuant to receipt of prior information. During *Nakabandi*, they stopped the Suzuki Pickup bearing No. Ai-1770 for the purpose of checking. During search of the vehicle, the levy officials recovered Chars net weighing 3044 grams (comprising of three packets), allegedly lying in a blue colour bag, beneath the legs of the accused/appellant, Sabir Shah. Now the only question before this Court for determination would be as to whether the accused/appellant being a driver of the vehicle was having conscious knowledge of the contraband in question allegedly lying in a bag in his legs or otherwise? Needless to highlight that it is the duty of the prosecution to prove the conscious knowledge of the appellant qua the contraband in question. It is an admitted fact floating on the surface of the record that in this case the alleged recovery has been made from the blue colour bag allegedly lying in the legs of the appellant, however, it is a matter of record that the aforesaid bag has neither been separately taken into possession through any recovery memo nor the same has been exhibited in the trial, therefore, the prosecution has not been able to prove the foundation stone of their case. It is also part of the

record that during the course of investigation it transpires that the vehicle from which the alleged recovery of contraband has been made belongs to one Saeed-ul-Ibrar. The record shows that subsequently the said Saeed-ul-Ibrar appeared before the Court as OW-2 and he has also produced the relevant documents of the ownership of the said vehicle and in this regard he also produced Zahoor-ul-Haq as OW-1, however, the prosecution has not arrayed him as an accused in the subject case. The possibility that in-fact the contraband was placed by the owner of the vehicle could not be ruled out. Since the contraband was recovered from a place which is visible to ordinary eyes, therefore, in the given facts and circumstances, the prosecution has not been able to prove the conscious knowledge on the part of the appellant. It merits to mention here that it is not mere the possession of the contraband which is punishable but such possession must be on the basis of conscious knowledge. In the subject case, the prosecution has not been able to prove that in-fact the contraband which was placed in the vehicle in invisible place was in-fact with the conscious knowledge of the appellant or otherwise. In case titled ***"Muhammad***

Noor & others v/s The State" reported as *2010 SCMR 927*, the Apex Court has held as under;-

It is permissible to look into the object of the legislature and find out whether, as a matter of fact, the legislature intended anything to be proved except possession of the article as constituting the element of the offence. Even if it is assumed that the offence is absolute, the word "Possess" appearing in the section 6 connotes some sort of knowledge about the things possessed. So we have to determine what is meant by word "possess" in the section. It is necessary to show that the accused had the article, which turned out to be narcotic drugs. In other words the prosecution must prove that the accused was knowingly in control of something in the circumstances, which showed that he was assenting to being in control of it. It is not necessary to show in fact that he had actual knowledge of that which he had.

Similarly, in case titled "*Shahzada v/s The State"* reported as *2010 SCMR 841* it was also held by the Apex Court that;-

No such evidence has been led by the prosecution to prove the above aspects of the case so as to make the appellants responsible for the commission of the crime along with the Driver. If the property would have been lying open within the view of the appellants or they knew the placement of the property then the situation would have been different. In such a situation, the appellants were required to explain their position, as required under Article 122 of Qanun-e-Shahadat Order, 1984 and without such explanation their involvement in the case would have been proved. As the property was not within their view and they had no knowledge of the placement of the property, therefore, they cannot be held responsible and in joint possession of the property with the Driver.

In another case the august Supreme Court of Pakistan reported as *1997 SCMR 345* in such like situation, the other fellow of the truck driver sitting with him (driver) has been absolved of the charge in view of the possibility that he might had no, knowledge of the presence of heroin in the truck.

10. Other than the above, it is part of the record that after drafting of the *'Murasila'* followed FIR coupled with separation of samples on the spot, the investigation of the subject case was handed over to Muhammad Ilyas, IHC. As per contents of Mad Report No. 20, the Investigation Officer, Muhammad Ilyas, IHC in the company of Madad Muharir, Hashim Khan and Muhammad Ayaz proceeded to the spot of occurrence on 02.01.2023 at 05.25 hours, however, when the aforesaid three officials were returned to the police station/Levy Post concerned on the same date i.e. 02.01.2023 at 06:30 hours, as reflect from Mad Report No. 21, they were accompanied by the fourth official by the name of ***Muhammad Shahid***. Needless to mention that Muhammad Shahid is the most relevant witness of the prosecution in a sense that he is the marginal witness to the recovery memo, Ex. PW-3/1 which is with respect to the recovery of the alleged contraband. Here the question arises, that if he was not a member of the initial police party headed by the Investigation Officer, Muhammad Ilyas, IHC, then how & for what reason his name was later on mentioned in the returning party of the police, therefore, this element also cast a serious doubt on the mode & manner of the

alleged recovery of the contraband from the vehicle in question which was allegedly driven by the accused/ appellant, Sabir Shah.

11. *Muharir* of the levy post concerned, Sana Ullah appeared in the witness-box as PW-1. In his examination-in-cross he has come up with an admission that it is correct that in column 3 of register No. 19 the signature of the seizing officer has not been obtained. He has also shown ignorance about the number of monograms registered in register No. 19. The seizing officer/complainant of the case in hand was examined in Court as PW-4. In his cross-examination he stated that the case property was in the form of each slab and the case property was in solid condition, however, during the Court proceedings when the parcel was opened, the case property turned out to be in another shape, whereby, one slab was in soft form, whereas the remaining two slabs were in solid condition. The complainant also affirmed the assertion of the *Muharir* of the levy post in terms that he had not put his signature in register No. 19. Likewise, the testimony of the Investigation Officer, Muhammad Ilyas, IHC, PW-5 is not above the board. In his cross-examination he has admitted that in their Department

there is Post Commander by the name of Naik Rehman and the monogram affixed on the representative samples by the abbreviation of ***"N.R"*** might be of his name, whereas, the Post Commander of the subject case is Noor Zada Khan and the name of his abbreviation would be ***"N.Z"***. In view of the aforesaid admissions on part of the material witnesses of the prosecution the case of the accused/appellant qua his alleged offence of transportation of narcotics is prima facie standing in vacuum, as such, he is entitled for its benefit.

12. It is also relevant to mention here that in this case the seizing officer and the person who has separated the samples on the spot is Post Commander, Noor Zada, however, the parcels prepared by him on the spot do not reflect the abbreviation of his name as the monogram of ***"N.R"*** has been inscribed on the same. Needless to highlight that under the Rules and as per the judgments of the Apex Court the seizing officer is bound to inscribe the abbreviation of his own name as the abbreviation of ***"N.R"*** does not reflect the

name of none of the persons present on the spot including the seizing officer-cum-Investigating Officer, as such, the prosecution has not been able to prove that as to who separated the samples from the recovered stuff and that as to who has dispatched or taken them to the police station, which failure of the prosecution is fatal for their case. Such flaw was found fatal by the Apex Court in case titled ***" Khtar Iqbal v/s The State"*** reported as ***2015 SCMR 291*** by observing that;-

The most important factor in that connection, which compounded all those doubts and raised a big question mark upon the veracity of the prosecution's case against the appellant, was that after allegedly recovering the contraband substance from the boot of the motorcar driven by the appellant the parcels of the recovered substance were sealed with a monogram reading as SJ and it had been disclosed by Mati-ur-Rehman (P.W.2) before the learned trial Court that the said monogram belonged to one Sameen Jan Inspector who was not even posted at the relevant Police Station at the time of the alleged recovery from the appellant and as a matter of fact at the said time the said Inspector was serving at a Police Station in Quetta. Mati-ur-Rehman (P.W.2) had not been able to advance any explanation whatsoever as to why the recovery officer namely Assistant Director Rehmat had not put his own monogram on the seals of the parcels prepared by him and as to why he had used the monogram of some other officer who was not even posted at the relevant Police Station at the relevant time.

Similarly, this Court in case titled ***"Usman Shah v/s The State"*** reported as ***2022***

YLR 821 has also reiterated the same rational by holding that;-

The seizing officer while appearing before the Court as PW-2, deposed in his Court's statement that after recovery of contraband, he separated samples for FSL purpose and sealed in parcels Nos.1 to 8 and remaining stuff in parcel No.9 with a monogram of "MK" which, he categorically admitted that same is not pertained to his name and in-fact the same stands for Mukhtiar Khan, S.I., who was stated to be present with the complainant. The alleged recovery seems to be doubtful, rather hints at something to be planted by complainant, because said Mukhtiar Khan SI was never cited as a witness during proceedings in the instant case. This witness, after few moments, in his cross-examination contradicted his own statement by deposing that "Mukhtiar Khan S.I. was present in the P.S. at that very time. The MK monogram was lying with me in the official van". Be that as it may, the Seizing Officer, pursuant to spy information, should have been required to have his own monogram with the letters "RK" in his possession to have strengthened and substantiated his version, but he disrupted the episode in a casual manner.

13. It is part of the record that in the subject case the investigation has been carried-out by Muhammad Ilyas, IHC (PW-5), who is below the rank of Sub-Inspector. For ready reference Section 2 (e) (ii), K.P, CNSA Act, 2019 is reproduced below;-

(ii) a police officer/official not below the rank of Sub-Inspector, authorized by the Regional Officer;

However, in the case in hand, the aforesaid mandatory provision has not been complied with, therefore, on this score too, the conviction & sentence of the accused/appellant

recorded by the trial Court is not sustainable in the eyes of law.

14. It is also part of the record that though it is the case of prosecution from very inception that the appellant was transporting the contraband in the Suzuki vehicle bearing No. Ai-1770 and it is their case that on search of the said vehicle the alleged contraband was recovered from the adjacent place near the driver seat, allegedly lying in a bag, as such, it was an important piece of evidence with the prosecution to connect the present appellant with the commission of offence, however, it is surprising that the prosecution has not been able to produce and exhibited the said vehicle in the trial Court. Though the rival claimant of the vehicle Saeed-ul-Ibrar recorded his statement as OW-2 and he also relied upon the account of Zahoor-ul-Haq recorded as OW-1. We have gone through the whole case record but could not found any exhibited documentary evidence in this regard except the bargain receipt and undocumented

vehicle record system/registration documents brought on record by the claimant/appellant, Saeed-ul-Ibrar. The prosecution was bound to make some reasonable & visible efforts to make sure the production of the said vehicle and exhibited the same during the trial, therefore, non-production of the vehicle and non-exhibition has cut the very roots of the prosecution case and thus on this score too, the benefit has to be extended to the appellant. It is an established principle of law that when the prosecution has not been able to produce the case property before the Court for its exhibition then no conviction could be recorded for the alleged contraband recovered from an accused person. In a somewhat similar situation, this Court in its earlier judgment rendered in case titled ***"Usman Shah v/s The State"*** reported ***2022 YLR 821*** has held that;-

The vehicle, from which the alleged recovery was effected, was not produced before the Court and was not exhibited during trial. The case property had not been produced by the police before the trial court without any justification, which shows 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, which created a dent in the prosecution case causing serious doubt with regard to the occurrence.

Similarly, in case titled ***"Muhammad Fayaz v/s The State"*** reported as ***PLD 2017 Peshawar 74***, this Court has also observed that;-

It is very strange to observe that despite pendency of trial for about one year followed by repeated directions issued by learned trial Court, the prosecution kept mum for such a long period regarding non-production of case property and then after destruction of the case property on 26.6.2012, they did not utter any word for further 10 months, concealing the actual facts from the trial Court, which creates doubt in a prudent mind regarding recovery of alleged contraband from the possession of appellant. Had there been any recovery effected from the appellant, then the prosecution could have produced the same before the Court for exhibition or to bring the actual fact regarding destruction of case property into the notice of trial Court which they failed to do so.

Likewise, in case titled ***"Imtiaz Khan v/s The State"*** reported as ***2020 P Cr.LJ 202*** in a similar situation akin to the present one, this Court has concluded that;-

We find a peculiar situation, where instead of confronting the accused-appellants with the relevant incriminating evidence/ case property, they were confronted with the procedure adopted on the spot, while no case property was produced and exhibited before the trial court during the course of examination of accused/appellants, so therefore, the evidence used against the accused/appellant on that account was incomplete.

15. It is well settled, it is not essential at all to place reliance on multiple doubts coupled with multiple grounds to extend the benefit of

doubt to an accused, even a single worth reliable doubt is sufficient enough to extend its benefit to an accused person as it is the cardinal principle of criminal administration of justice that let hundred guilty persons be acquitted but one innocent person should not be convicted. In case titled ***"Tariq Pervaiz v/s The State"*** reported as ***1995 SCMR 1345*** , the Apex Court has held as under;-

That the concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right.

Further reliance is placed on the case law cited as ***"Daniel boyd (Muslim name Saifullah) vs the State"*** reported as ***1992 SCMR 196***", where the following observations were recorded by the Apex Court;-

Nobody is to be punished unless proved guilty on the basis of reliable or true evidence. Benefit of every reasonable doubt is to go to the accused.

This view also reflects in the judgment of the apex Court titled as ***"Ghulam***

Qadir and 2 others vs the State" reported as ***2008 SCMR 1221***, wherein it was observed that:-

"Benefit of doubt. Principle of applicability. For the purpose of benefit of doubt to an accused, more than one infirmity is not required. Single infirmity creates reasonable doubt in the mind of a reasonable and prudent person regarding the truth of charge, makes the whole case doubtful. "

In support of the same rational, further reliance is placed on the judgment of the august Supreme Court of Pakistan cited as ***"Muhammad Zaman vs. the State" (2014 SCMR 749)***, wherein it was held that;-

Even a single doubt if found reasonable, was enough to warrant acquittal of the accused.

16. For what has been discussed above, this Court is of the firm view that the prosecution has failed to prove its case against the accused/ appellant, Sabir Shah beyond reasonable doubt, as such, his conviction cannot be maintained. Resultantly, while extending him the benefit of the doubt the subject criminal appeal is allowed and the impugned order/judgment of conviction & sentence dated 28.09.2023 recorded by the learned trial Court is set aside and consequently the accused/appellant named above is acquitted of the

charges leveled against him. He be released forthwith from the Jail, if not otherwise required.

17. As far as the case of the claimant/appellant of Criminal Appeal No. 302-M of 2023, Saeed-ul-Ibrar with respect to the grant of permanent custody of the Suzuki vehicle is concerned, suffice it to state, that it has never been the case of the prosecution that the contraband in question has been recovered from the secret cavities allegedly prepared in the subject vehicle rather their stance was that the contraband was recovered from a bag allegedly lying in the legs of the accused/appellant, Sabir Shah, therefore, the findings of the learned trial Court in the impugned order/judgment dated 28.09.2023 in respect confiscation of the vehicle in favour of the State needs re-consideration. It is also part of the record that during the course of trial, the claimant/appellant, Saeed-ul-Ibrar also produced evidence in respect of ownership of the vehicle in question which comprises of his statement recorded as OW-1 as well as that of one Zahoor-ul-Haq recorded as OW-2. In this regard, the claimant/appellant also brought on record the

bargain receipt as Ex. OW-1/1, vide which, the vehicle was purchased by him from one Umar Mukhtiar in lieu of sale consideration in the sum of Rs. 6,20,000/-. He also brought on file the registration documents/ *"undocumented vehicle record system"* of the vehicle as Ex. OW-2/1, therefore, on the strength of this documentary evidence, the claimant/appellant is prima facie owner of the vehicle in question.

18. The record so furnished would further indicate that when the aforesaid vehicle was taken into possession by the local police from the custody of the accused/appellant, Sabir Shah who has since been acquitted, the present claimant/appellant soon thereafter approached to the learned trial Court for the interim custody of the vehicle, however, the said application was later on withdrawn. The record further shows that the claimant/ appellant is a sole claimant as no rival claimant has come forward till date to claim the subject vehicle. The record is also silent with respect to tempering or welding of the chassis number of the subject vehicle. The record also shows that the subject vehicle is neither the case property nor used in the commission of any other offence except the one referred to above,

therefore, the claimant/appellant has made out a case for the custody of the subject vehicle/ motorcar. In case titled ***"Javaid Arshad Abid v/s Station House Officer & other"*** reported as ***2005 SCMR 735***, the Apex Court has held as under;-

The disputed car was neither used in commission of any offence nor any F.I.R. regarding its theft was registered. Petitioner claiming to have purchased such car which had remained in his possession till same was taken into custody by Anti-Car Lifting Staff of Police. No other claimant had come forward. Custody of car was ordered to be handed over to petitioner.

Similarly, in case titled ***"Muhammad Hanif v/s The State & others"*** reported as ***2011 SCMR 1471***, the Apex Court has also held that;-

No other person has so far come forward to claim ownership or possession of that vehicle. The petitioner is not an accused person in the above mentioned criminal case and he undertakes to produce the relevant vehicle before any court of law if and when required to do so.

19. Accordingly, the connected Criminal Appeal No. 302-M of 2023 is allowed, the impugned order/judgment of the learned trial Court dated 28.09.2023 is also set-aside to the extent of confiscation of vehicle in favour of the State and consequently the SHO of Levy Post/Police Station, Hassan Khan Shaheed, Alladhand, District Malakand is directed to hand over the ***Vehicle/Motorcar Suzuki (NCP) bearing chassis No. DA51T-187835*** to the claimant/appellant,

Saeed-ul-Ibrar forthwith against a proper entry in the relevant record.

Date of announcement
Dt: 27.11.2023

JUDGE

Office
30/11/2023
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