

IN THE PESHAWAR HIGH COURT,
PESHAWAR,
[Judicial Department]

Cr.A. No.227-P/2021

Qasam Khan son of Ghulam Raza,
r/o Dary Plaray Qambar Khel Bara,
District Khyber.

Appellant (s)

VERSUS

The State

Respondent (s)

For Appellant (s) :-	<u>M/S Noor Alam Khan & Kamran</u> <u>Ahmad, Advocates.</u>
For State :-	<u>Mr. Jalal ud Din Khan Akbar-e-</u> <u>Azam Gara, AAG.</u>
Date of hearing:	<u>23.05.2023</u>

JUDGMENT

ISHTIAQ IBRAHIM, J.- This criminal appeal under Section 24 Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019 (“Act of 2019”) read with section 410 Cr.P.C., filed by Qasam Khan, the appellant, is directed against the judgment dated 27.02.2021, rendered by learned Additional Sessions Judge-II District Khyber, whereby he has convicted the appellant under section 9 (d) of the Act of 2019 and sentenced him to undergo rigorous imprisonment for life and to pay a fine of rupees five lac and in default thereof to further undergo one year simple imprisonment, in case FIR No.12 dated 18.01.2020, registered under section 9 (d) of the Act of 2019 at

Police Station Jamrud District Khyber. Benefit of Section 382-B Cr.P.C. has been extended to him.

2. The prosecution's case as per contents of First Information Report ("FIR") Exh.PW.8/1 is that on receipt of spy information about smuggling of narcotics through a Suzuki Van bearing Registration No.LEC.3209-Lahore from Bara Khyber towards Jamrud, on 18.01.2020 Naimat Khan ASI (PW.2) along with other police officials conducted *Nakabandi* at *Inzaro* check-post and at 1415 hours intercepted the said Suzuki Van. On query, its driver disclosed his name as Qasam Khan (the appellant). On search of the vehicle, the complainant ASI, recovered 15 packets of chars from the secret cavities made in the vehicle, each weighing 01 Kilogram, total 15 Kilograms. He separated 05 grams from each packet as sample for chemical analysis by the FSL and sealed the same into parcels No.1 to 15. He also sealed the remaining quantity into a separate parcel No.16 and thereafter took the same into possession along with the vehicle vide recovery memo Exh.PW.1/1 in presence of its marginal witnesses. He issued arrest card of the appellant Exh.PW.2/2, drafted Murasila Exh.PW.2/1 and sent the same to Police Station on the basis of which FIR Exh.PW.8/1 was registered against the appellant and handed over the case property along with


samples to Moharrir of the Police Station of safe custody in Malkhana of the PS. On completion of investigation by Aziz Khan ASI (PW.5), Muhammad Akbar SHO (PW.4), submitted complete *challan* against the appellant before the learned trial Court.

3. On receipt of challan, the appellant was summoned by the learned Trial Court and formally charge sheeted under section 9 (d) of the Act of 2019, to which he pleaded not guilty and claimed trial. To prove its case, the prosecution examined as many as eight witnesses. After closure of the prosecution's evidence, statement of the appellant was recorded under section 342 Cr.P.C., wherein he denied the prosecution's allegation and professed his innocence.

He, however, neither wished to be examined on oath under section 340 (2) Cr.P.C. or to produce evidence in defence. On conclusion of trial, the learned trial court, after hearing both the sides convicted and sentence the appellant as mentioned in the initial paragraph of this judgment, hence, this appeal.

4. Learned counsel for the appellant argued that as the Seizing Officer of this case is Assistant Sub-Inspector (ASI), therefore, he was not competent to arrest without warrant and conduct the search and seizure as under sections 28 and 30 of the Act of 2019, only an "*authorized Officer*" has been empowered to

do so; that under section 2(e) (ii) an "Authorized Officer" means a Police Officer not below the rank of sub-Inspector, authorized by the Regional Police Officer, therefore, the entire proceedings conducted by an ASI in this case are nothing but nullity in the eye of law. On merits, he contended that prosecution's evidence is pregnant with doubts benefit of which should have been extended to the appellant but the learned trial court by over sighting the above important aspects of the case has erred in law by holding the appellant guilty of the offence, hence, the impugned judgment is liable to be set aside.



5. Conversely, the worthy AAG supported the impugned judgment and contended that provisions of sections 28 and 30 of the Act of 2019 being directory in nature, non-compliance thereof would not be a ground for holding the proceedings bad in the eye of law. He requested for dismissal of the appeal.

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

7. Before dilating upon merits of the case in light of the evidence available on record, we deem it appropriate and necessary to answer the first legal argument advanced by the learned counsel for the appellant in respect of incompetency of Seizing

Officer/ASI to make search, seizure and arrest without warrant. It may be noted that Control of Narcotic Substances Act, 1997 ("Act of 1997"), was promulgated in the year 1997 and made applicable and extendable throughout Pakistan. Subsequently, in year 2019 the Government of Khyber Pakhtunkhwa enacted and promulgated the Khyber Pakhtunkhwa Control of Narcotics Substances Act 2019 ("Act of 2019"), vide notification dated 4th September, 2019 and the same was made applicable and extendable to the Province of the Khyber Pakhtunkhwa. Though under section 59, the Act of 1997 has been repealed but only to the extent of cultivation, possession, selling, purchasing, delivery and transportation etc within the Province of the Khyber Pakhtunkhwa, which read as under:-

"59. Repeal and Savings:- (1) The
Control of Narcotics Substances Act,
1997 (Act No.XXV of 1997), to the
extent of cultivation, possession,
selling, purchasing delivery and
transportation etc within the
Province, to the extent of the Khyber
Pakhtunkhwa is hereby repealed."

8. Section 59 (ibid) does not provide specifically about repealing of rest of the provisions of the Act of 1997. Sections 21 and 23 of the Act of 1997 are similar to a great extent with sections 28 and 30 of the Act of 2019, as both speak about the power of entry, search, seizure and arrest of accused without warrant and

power to stop and search conveyance by an authorized Officer. For the sake of convenience and ready reference, the aforesaid sections of the two statutes are reproduced below for comparison:-

Control of Narcotics Substance Act 1997

21. Power of entry, search, seizure and arrest without warrant. – (1) Where an officer, not

below the rank of Sub-Inspector of Police or equivalent authorized in this behalf by the Federal Government or the Provincial Government, who from his personal knowledge or from information given to him by any person is of opinion that any narcotic drug, psychotropic substance or controlled substance in respect of which an offence punishable under this Act has been committed is kept or concealed in any building, place, premises or conveyance, and a warrant for arrest or search cannot be obtained against such, person without affording him an opportunity for the concealment of evidence or facility for his escape; such officer may:-

(a) enter into any such building, place, premises or conveyance; (b) break open any door and remove any other Obstacle to such entry in case of resistance;

(c) seize such narcotic drugs, psychotropic substances and controlled substances and other materials used in the manufacture thereof and any other article which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act; and

(b) Detain, search and, if he thinks proper, arrest any person whom he has reason to believe

to have committed an offence punishable under this Act.

(2) Before or immediately after taking any action under sub-section (1), the officer referred to in that sub-section shall record the grounds and basis of his information and proposed action and forthwith send a copy thereof, to his immediate superior officer.

"23. Power to stop and search conveyance:-

An Officer referred to in section 19, may, if he has reason to suspect that any conveyance is, or is about to be, used for the transport of any narcotic drug, psychotropic substance or controlled substance in respect of which he suspects that any provision of this Act has been, or is being, or is about to be, contravened at any time, stop such conveyance or, in the case of any aircraft, compel it to land and;

- (a) Rummage and search the conveyance or part thereof;
- (b) Examine and search any goods on or in the conveyance; or
- (c) If it becomes necessary to stop the conveyance, he may use all reasonable force for stopping it.

Sections 28 and 30 of KP Control of Narcotics

Substances Act, 2019.

28. Power of entry, search, seizure and arrest without warrant.---(1) Where an authorized officer, who from his personal knowledge or from information given to him by any person, is of the opinion that any narcotic substance is kept or concealed in any building, place, premises, dwelling house or conveyance and warrant for the search or arrest cannot be obtained from the Special Court against such person without affording him an opportunity for the concealment of evidence or facility for his escape, such officer may-

(a) enter into any such building, place, premises, dwelling house subject to the proviso of sub-section (1) of Section 27 of this Act;

(b) break open any door and remove any other obstacle to such entry in case of resistance;

(c) seize such narcotic substances, methamphetamine and other materials used in the manufacturing thereof and any other article or documents which he has reason to believe to be liable for confiscation or may furnish evidence of the commission of an offence punishable under this Act; and

(d) search and, if he thinks proper, arrest any person whom he has reason to believe to have committed an offence punishable under this Act.

(2) Before or immediately after taking any action under sub-section (1), the authorized officer, mentioned in sub-section (1), shall record the grounds and basis of his information and take immediate necessary action and forthwith send a copy of the same to the Director or as the case may be to the Regional Police Officer”.

“S.30. Power to spot and search conveyance:-

An authorized Officer, may, if he has reason to suspect that any conveyance is or is about to be used for the transportation of any narcotic substance, at any time, stop such conveyance and:-

- a) Search and examine the conveyance, person and good or part thereof laying in such conveyance;
- b) Seize the narcotic substances recover during search and arrest the accused; and
- c) If it becomes necessary to stop the conveyance, he may use all reasonable for stopping it.

9. **“Authorized Officer”** under section 2(e) of the Act of 2019, which means:- (i) An Officer of the

Directorate General, not below the rank of Sub-Inspector, authorized by the Director; or (ii) A Police Officer/official not below the rank of Sub-Inspector, authorized by the Regional Police Officer, or (iii) An officer or official of the ANF, not below the rank of Sub-Inspector, authorized by the Regional Director. Sections 21 and 23 of the Act of 1997 are almost ditto copy of sections 28 and 30 of the Act of 2019. Section 23 of the Act of 1997 similar to section 30 of the Act of 2019, remained the issue of discussion before the Hon'ble Supreme Court of Pakistan in various cases including case titled, "Muhammad Younas and others vs Mst. Perveen alias Mano and others" (2007 SCMR 393), wherein it has been held by the Hon'ble supreme court that arrest of accused in possession of narcotics by a Police Officer below the rank of Sub-Inspector would not vitiate the prosecution case, rather the competent Court would proceed to determine the guilt or innocence of the accused on the basis of evidence, irrespective of the manner in which he is brought before the court. Relevant part of the judgment (*ibid*) is reproduced below for ready reference:-

"The other argument of the learned counsel for the respondent No.1 as to the violation of the provision of section 21 and 22 of the Act needs to be dealt with. Ordinarily, only an

officer of the rank of Sub-Inspector or equivalent or above may exercise the powers of arrest and seizure of narcotics. But this is not an absolute rule. There may be cases of extreme urgency requiring prompt action, where an accused is caught with narcotics in his possession by a Police Officer of a lower rank. Can it be said that such Police Officer should just let him go with the narcotics? The answer would certainly be in the emphatic "No". The guilt or innocence of an accused does not depend on the question of competence or otherwise of a Police Officer to investigate the offence. A trial of an accused is not vitiated mere on the ground that the case has been investigated by an officer who is not authorized to do so unless a contrary intention appears from the language of a statute. The competent Court would proceed to determine the guilt or innocence of an accused on the basis of the evidence produced before it irrespective of the manner in which he is brought before it".

A somewhat similar view was taken in the cases of "Mr. Abdul Latif Vs GM Paracha and others" (1981 SCMR 1101), "State through Advocate General Sindh Vs Bashir and others" (PLD 1997 SC 408), "The Crown vs Mehar Ali" (PLD 1956 FC 106), " M.S.K Ibrat Vs the Commander in chief, Royal

Pakistan Navy and others” (PLD 1956 SC 264), “Ahmad Khan Vs Rasul Shah and others” (PLD 1975 SC 66 at page 81, 88 and 151-152), “Muhammad and others Vs the State” (1984 SCMR 954) and “the State vs Sohail Ahmed and 04 others” (PLD 1990 FSC 29). We may however observe that in a proper case, a Police Officer, if guilty of deliberate usurpation of power and violation of a statute may render himself liable to disciplinary or penal action or both in accordance with law. The purpose of enacting protective provisions of sections 21 and 22 of the Act seems to be that normally the cases of narcotics being of serious nature should be handled by more responsible Police Officer.

In case titled, “The State vs Abdali Shah”, (2009 SCMR 291), it has been held by the Hon’ble Supreme Court that:-

“Even the provisions of sections 20 to 22 of CNSA being directory, non-compliance thereof would not be a ground for holding the trial/conviction bad in the eyes of law. On this ground the conviction of the appellant cannot be set aside. Reference in this behalf can be made to the case of Fida Jan v the State 2001 SCMR 36; State through AG Sindh v Hemjoo 2003 SCMR 881, Karl Johan Joseph v the State PLD 2004 SC 394 and Muhammad Younas v Mst. Perveen alias Mano and others 2007 SCMR 393, wherein it is observed that where provisions of CNSA are directory in

nature, non-compliance of the same is not fatal”.

While dilating upon the provision of section 21 of the Act of 1997, the Hon’ble Supreme Court in case titled, **“The State Vs Abdali Shah” (2009 SCMR 291)**, was pleased to observe as under:-

“It would be seen that a huge quantity of 52 Kgs of chars was allegedly recovered from the Taxi beside which the respondent was standing while closing its dickey. It is not possible that the police would foist such a huge quantity of charas upon him. It appears that the learned High Court has relied heavily upon the technical aspect of the seizure and arrest which in our opinion are misconceived as in the first place no raid was carried out by the police personnel but the respondent apprehended during normal patrol duty. As such the provisions of section 21 are not applicable. Even otherwise, it cannot be expected that upon apprehension of the accused the police party would go in search of the officer who is entitled to arrest the accused being an ASI. At the most, this was an irregularity which was curable under section 537 Cr.P.C. as held by this Court in case of Muhammad Hanif (supra).

10. Similar is the view of the Hon’ble four Members Bench of the Hon’ble Supreme Court in case titled, **“Zafar Vs the State” (2008 SCMR 1254)** wherein it has been held that the provisions of sections 20 to 22 of the CNSA being directory, non-compliance thereof would not be a ground for holding the trial/conviction bad in the eyes of law.

11. In view of the law settled by the Hon'ble Supreme Court in the judgments (*supra*), we are firm in our view to hold that mere non-compliance of the provisions of sections 28 and 30 of the Act of 2019 would not vitiate the proceedings and trial, and such non-compliance cannot be made a sole ground for acquittal of an accused.

12. Coming to merits of the case, record depicts that Niamat Khan ASI (PW.2), Seizing Officer of the case and Sohrab ud Din Constable (PW.1), marginal witness to recovery memo Exh.PW.1/1, have furnished ocular account of the occurrence. Both have furnished the story of the arrest of the appellant from vehicle bearing registration No.LEC.3209 and recovery of huge quantity of chars in 15 packets from secret cavities of the vehicle being driven by the appellant at the relevant time. They also exhibited the recovered contraband narcotics as Exh.P.1 and vehicle as Exh.P.2 before the learned trial court. Despite lengthy and taxing cross-examination nothing beneficial has been extracted from their mouths. They have remained stuck to their stance and have corroborated each other on all material aspects of the occurrence such as the day, date, time and place of arrest of the appellant and recovery of narcotics from secret cavities of the vehicle being driven by the appellant at the relevant

time as well as the proceedings conducted at the spot. Their testimony is further supplemented by positive FSL report Exh.PW.5/6.

13. Prosecution has also proved the chain of safe transmission of the samples from the spot to the FSL through the testimony of Niamat Khan ASI (PW.2), Israrullah Khan HC (PW.3), Tahir Moharrir (PW.6) and Rafi Ullah Moharrir (PW.7). The above named witnesses have also been cross-examined by the defence but nothing of the sort could be extracted from them so as to make the transmission of the samples from the spot to the FSL as doubtful or that during the period of its transmission the same were interfered with or tampered. No doubt, PWs are the police officials but they are competent witnesses like any other independent witness and their testimony cannot be discarded merely on the ground that they are the police employees unless and until any ill will or enmity with the appellant is proved against them. Nothing in black & white is available on file or even otherwise suggested by the defence in their cross-examination that they had any ill will or enmity with the appellant. In this regard reliance is placed on case titled, "Muhammad Azam Vs the State (PLD 1996 SC 67), "Muhammad Hanif Vs the State 2003 SCMR 1237), "Riaz Ahmad Vs the State 2004

SCMR 988) “Naseer Ahmad Vs the State 2003

SCMR 1361) and “Zafar Vs the State” (2008

SCMR 1254).

14. On reappraisal of the evidence we have reached to an irresistible conclusion that all the prosecution’s witnesses have deposed in line to support the prosecution’s case. They have passed the test of lengthy cross-examination but the defence failed to make any dent in the prosecution story or to extract any material contradiction fatal to the prosecution case in the testimony of the PWs. The prosecution has been successful to bring home the guilt of the appellant to the hilt by placing ocular account, recovery of narcotics material, the chemical examiner report Exh.PW.5/6. The learned counsel for the appellant has not been able to point out any error or law in the impugned judgment and the same being exceptionable, is not open to any interference by this court.

14. Accordingly, this appeal being meritless stands dismissed.

Announced:

23.05.2023

M.Siraj Afridi CS

JUDGE

JUDGE

DB of
Mr. Justice Ishtiaq Ibrahim
and Hon’ble Mr. Justice Sahibzada Asadullah