JUDGMENT SHEET
IN THE PESHAWAR HIGH OURT,
PESHAWAR,
[JUDICIAL DEPARTMENT]

Criminal Appeal No. 594-P/2020.

The State through AG Vs. Shahid Hussain.

For appellant: - Mr. Rab Nawaz Khan, AAG.

For accused/respdt: Nemo.

Date of hearing: **16.11.2020**

J U D G M E N T

MUHAMMAD NAEEM ANWAR, J.- The State through Advocate General has filed the instant appeal against the judgment and order dated 04.12.2019 passed by learned Judge, Special Court/ Sessions Judge, Kohat, whereby the accused-respondent Shahid Hussain, involved in a case FIR No. 211, dated 03.08.2017 under section 9 (c) CNSA of Police Station, Usterzai, District Kohat, was acquitted.

2. Facts of the case, precisely, as obvious from the record, are that on 03.08.2017 Abdur Rauf SHO, Police Station, Usterzai, (PW-2) along with other police party was on patrol duty of the Illaqa, when at 11.00 hours a person on seeing the police party from a sufficient distance started running, who was chased but he succeeded in his escape, however, during search of the nearby area, the police recovered a plastic envelope containing 3600 grams chars coupled with a mobile set having V-Fone SIM as well as a Q model phone having SIM No. 0336-9296277. The SHO drafted murasilla in this respect, which was sent to the Police Station through constable Akbar Khan for registration of case against an unknown accused, consequently, the present case FIR, Exh.PA was

registered against an unknown accused. After registration of the case, copy of the FIR was entrusted to Muhammad Azam SI (PW-6), who visited the spot and prepared the site plan Ex. PB at the instance of the complainant. He obtained CDR data of SIM No. 0336-9296277 and on the basis of which the present respondent was nominated as an accused. He was arrested in the case and after completion of investigation; complete challan was submitted before the Court of learned Sessions Judge/ Judge, Special Court, Kohat, where, at the commencement of trial, the prosecution produced seven witnesses. On close of the prosecution evidence, the accused-respondent was examined under section 342 Cr.P.C, wherein he denied the charges, professed innocence and stated to have falsely been implicated in the case. He, however, wished to produce no defence nor to examine himself on oath as required under section 340(2) Cr.P.C. The learned trial court, on conclusion of the trial, acquitted the respondent-accused, vide judgment herein impugned.

3. Arguments heard and record perused.

4. Admittedly, neither the alleged illegal stuff has been recovered from the direct possession of the accused-respondent nor he is shown arrested on the spot. It is also definite that neither his name is mentioned in the FIR nor his feature is available in it. According to the prosecution story, the SIM recovered from the spot was registered in the name of accused-respondent, therefore, he was arrested in the case. The Seizing Officer (PW-2) and marginal witness to the recovery memo Exh.PW 1/1/ in their cross examinations categorically

stated that they were unable to see the face of accused-respondent as his back was towards them, therefore, his description and feature was not given in the Murasilla, thus, the entire case of the prosecution is based on the CDR data of SIM No. 0336-9296277. In the backdrop, it is to be seen as to whether it was the accused-respondent, who had thrown the subject articles, whether the SIM number was registered in his name and whether the CDR data is sufficient for the conviction of the accused.

5. Call detail record (CDR) is a data, which includes information like, how many calls a person has made, to which number, time and duration of calls and from which tower the person received network while making the particular call. It is secondary evidence which can be taken into consideration provided the same is accurate and exclusion of any possibility of tempering or manipulation. We have perused the record and found nothing on record to show that the SIM relied by the prosecution was registered in the name of the accused-respondent. In the CDR data, marked as Exh. PW 6/5, though, the particulars, i.e., SIM number, name of accused-respondent with CNIC number coupled with FIR number of the case are mentioned but it has neither been attested, endorsed, stamped and signed by the responsible official of the concerned Cellular Company nor the official, who had prepared/taken out the same from the Computer, has been associated or produced before the Court to testify that it was issued by him. There is no explanation as to how the I.O obtained the CDR data marked as Ex PW 6/5 from the concerned Cellular Company

as there is no application for obtaining the requisite data from the Company, except the recovery memo Ex PW 6/1, in which process too official of the concerned company has not been associated. It is also interesting to note that the CDR data also bearing the FIR number and name of the Police Station and if it is printed out from the Computer then how FIR number and police station are mentioned in it as the present case was registered on 03.08.2017 while the CDR data is of dated 30.07.2017, therefore, such type of secondary evidence cannot be relied upon. This court in a case titled **Muhammad Parvaiz vs. the State (2019 Y L R 2213)** has observed that:-

> "12. Regarding the CDR report, Ex. PW-14/5, which has been given much weight by the learned trial Court in respect of the guilt of the present accused/appellant to the effect that allegedly the appellant and the acquitted co-accused Mst. Musarrat Shaheen had communicated with each other through their cell phones 38 times from 07.12.2015 to 09.12.2015. In respect of the C.D.R. data, suffice it to say, that the same is of no importance to the prosecution on various counts. As initially, it was the duty of the prosecution to have received the C.D.R. with an endorsement of the Cellular Company concerned, having stamp and signature thereupon of the concerned authorized officer, then while taking into possession the C.D.R., through a recovery memo, at least a concerned person should have been associated from the Cellular Company to independently prove the recovery or at least, recorded the statement of representative of the Cellular Company to the effect of issuance and receipt of C.D.R. but no such evidence have been collected. The perusal of C.D.R. also demonstrates that there is not even a single signature of authorized officer of the said Company, thus, it cannot be safely relied upon in any manner. Similar is the situation regarding the cell No. 033244952582. There is no record that the said cell number was registered in his name or whose name the said Sim was registered."

6. There are also glaring contradictions which create reasonable doubt as to the happening of the event not in the mode and manner as furnished by the prosecution. As per site plan Exh.PB, the distance between point A, the place of police mobile, and point B, the place of presence of the accused-respondent at which he for the first time observed the police, is 500 paces. Abdur Rauf, the complainant (PW-2) in his cross examination stated that the accused was seen from a distance of 200/250 paces while Farid Khan, (PW-1), who was present with the complainant at the relevant time and also marginal witness to the recovery memo Exh.PW 1/1, stated that the accused was seen from a distance of about 600/700 paces. Similarly, both the above named witnesses stated in their statements that the recovery of contraband was made from landed property while the Investigating Officer stated that it was made from the thoroughfare.

7. True, the FSL report regarding the recovered contraband is in positive but the same too is of no avail to the prosecution because the occurrence, as per record, took place on 03.08.2017 while, the FSL report Exh.PZ reveals that the samples were received by the Laboratory on 08.08.2017, after the delay of five days. Sami Ur Rehman, Moharrir of the concerned police station, (PW-3) in cross examination stated that parcels No.1 to 3 were handed over to OII. He further stated that he did not know as to when the I.O sent parcels No. 1 to 3 to the FSL. The prosecution has also failed to produce the official, who had taken the samples to the Laboratory; therefore, safe custody of the samples and delay in sending it

to the Laboratory, besides lack of the requisite protocol of the test applied, is yet another uncertainty which further making cricks in the prosecution story as the separated samples ought to have been received by the FSL, within 72 hours of the seizure as required by Rule 4(2) of the Control of Narcotic Substances (Government Analysts) Rules, 2001. Hon'able the Supreme Court of Pakistan in the case of **State through Regional Director ANF v. Imam Bakhsh and others (2018 SCMR 2039)** has observed that in a case where safe custody of the recovered substance or safe transmission of samples of the recovered substance is not established by the prosecution there it cannot be held that the prosecution had succeeded in establishing its case against the accused. Similarly, in the case titled **Khair-ul-Bashar v. the State (2019 SCMR 930),** it was held by the apex Court as under:--

> "10. In the present case examination of the report of the Government Analyst mentions the tests applied but does not provide their results except a concluding result, presumably of all the tests, which is not sufficient. The Report also does not signify the test protocols that were applied to carry out these tests. Hence, the mandatory requirement of law provided under Rule 6 has not been complied with and, thus, it is not safe to rely on the Report of the Government Analyst dated 18-02-2016. As a conclusion, it is reiterated, that the Report of the Government Analyst must mention (i) all the tests and analysis of the alleged drug (ii) the result of the each test(s) carried out along with the consolidated result and (iii) the name of all the protocols applied to carry out these tests.

Reliance is also placed on the case titled **Qaiser Javed Khan vs. The State through Prosecutor General Punjab,**

Lahore and another, (PLD 2020 SC 57) wherein it has been held by the Hon'able apex Court that:-

> "8. The report of the Government Analyst in the instant case does not specify the protocols of the tests applied and thus does not meet the requirements of the law as interpreted by this Court in the cases of Amam Bakhsh and Khair ul Bashar (supra). The said Report cannot be relied upon for the conviction of the petitioner."

8. We have perused the impugned judgment and found no misreading or non-reading of the evidence and on the contrary the evidence has been appreciated and assessed on the settled principles of law by the Court below, thus, the learned trial Court has rightly extended the benefit of doubt in favour of the accused-respondent. It is well settled principle of criminal law that it is for the prosecution to prove its case against the accused beyond a shadow of a doubt and if there is any doubt in the prosecution's case the benefit of such doubt must go to the accused. Rel: **Tariq Pervez v. The State (1995 SCMR 1345), Riaz Masih alias Mithoo v. The State (1995 SCMR 1730), Faheem Ahmed Farooqui v. The State (2008 SCMR 1572) & Hashim Qasim v. The State 2017 SCMR 986.**

9. It would be also not out of place to mention here that standard of appraisal of evidence in an appeal against acquittal is different than an appeal against conviction, because accused is presumed to be innocent in law and if after regular trial he is acquitted he earns a double presumption of innocence and heavy onus lies on the prosecution to rebut such presumption. Hon'able the apex Court in the case of ***"Mst. Jallan Vs.***

Muhammad Riaz and other" (PLD 2003 SC 644) it was observed that:-

> "Once an accused had earned acquittal in his favour, he enjoyed double presumption of innocence and the Court while examining the case of such accused must be very careful and cautious in interfering with the acquittal order and normally should not set aside the same merely for the reason that some other view was also possible--- interference, however, could be made in exercise of powers conferred upon the Court under S.417, Cr.P.C., if it was proved that the Court whose judgment was under scrutiny had misread such evidence".

Reliance is also on the cases titled ***"Zaheer-ud-Din Vs. The State" (1993 SCMR-1628), "Khan Vs. Sajjad and 2 others" (2004 SCMR 215), "Barkat Ali Vs. Shaukat Ali and others" (2004 SCMR 249,. "Farhat Azeem Vs. Asmat Ullah and 6 others" (2008 SCMR 1285), "Haji Payo Khan Vs. Sher Baz and others" (2009 SCMR 803), "Muhammad Aslam Vs. Sabir Hussain and others" (2009 SCMR 985),***

10. So, in view of the above discussion, we do not propose to draw a conclusion different from what the learned trial Court has drawn and, hence, we do not feel hesitant to uphold the acquittal of the respondent-accused, resultantly, the same is maintained and, accordingly, dismiss the appeal in *limine.*

Announced
16.11.2020 **J U D G E**
M.Zafral P.S

J U D G E

(DB Hon'able Mr. Justice Syed Arshad Ali and
Hon'able Mr. Justice Muhammad Naeem Anwar).