Judgment Sheet

IN THE PESHAWAR HIGH , PESHAWAR

Judicial Department

J.Cr.A No. 488-P/2017
Israr Khan Vs the State

Date of hearing 07.11.2019.

Nemo for the appellant.

Mr. Rab Nawaz Khan, AAG, for the State.

JUDGMENT

***

AHMAD ALI, J. Called in question herein is the judgment of the learned Additional Sessions Judge/Judge, Special Court, Lahor (Swabi) dated 24.05.2012, whereby the appellant (Israr Khan s/o Sher Muhammad) was convicted and sentenced to life imprisonment with fine of Rs.2,00,000/- in case FIR No.658 dated 30.05.2011, u/s 9-C CNSA, Police Station, Lahor (Swabi).

2. Brief facts of the case are that on receipt of information regarding smuggling of a huge quantity of chars from tribal area to Punjab and Sindh Provinces through motorway, Muhammad Arif, DSP, Sher Afsar Khan, SHO, Police Station, Lahor and other Police Officials of District Swabi, formed a raiding party and fenced the road at Mera Jalsai, on Peshawar/Islamabad

Motorway. At about 1400 hrs, an oil tanker coming from Peshawar was stopped and the person who was sitting on the driver seat disclosed his name as Abdur Raziq (acquitted accused) while the other person who was sitting with him on the front seat disclosed his name as Israr Khan (present appellant). Search of the vehicle led to the recovery of 2000 kgs chars garda from its secret cavity. Accused were arrested and a criminal case vide FIR ibid was registered against them.

3. On completion of investigation, complete challan against the present accused-appellant as well as acquitted accused (Abdur Raziq) was submitted in Court, where they were charge-sheeted to which they pleaded not guilty and claimed trial. The prosecution in order to prove its case, produced and examined as many as three witnesses. After closure of the prosecution's evidence, statements of the appellant and acquitted accused (Abdur Raziq), were recorded under section 342 Cr.P.C., wherein they denied the prosecution allegations and professed innocence. They however, declined to be examined on oath or to produce evidence in defence. On conclusion of the trial, the learned trial Court convicted and sentenced the appellants as well as acquitted-accused vide judgment dated 24.05.2012, against which only convict Abdur Raziq filed **Cr.A. No.300-P/2012**, before this Court, whereas, the present appellant-convict did not file any appeal. Above

mentioned appeal of Abdur Raziq was allowed by this Court vide judgment dated 23.11.2016, resultantly, he was acquitted. Now, the present accused-appellant has also filed the instant appeal from jail with a considerable delay, however, not only his liberty is involved but also his co-accused has already been acquitted by this Court and findings thereof have attained finality as the prosecution has not questioned the same before the august Supreme Court, therefore, the delay in filing of appeal is hereby condoned.

4. Arguments of learned AAG heard and record of the case gone through.

5. This Court while re-appraising the prosecution evidence during hearing of the appeal of Abdur Raziq (now acquitted), observed and reached the following conclusion vide judgment dated 23.11.2016:-

> "7. The prosecution to prove its case, examined as many as three witnesses but PWs-1 & 2, delay in sending the contraband substance to the FSL and the statement of accused recorded under Section 342 Cr.P.C are relevant for the just decision of the appeal. Munsif Khan, ASI, PW-1, in his cross-examination, stated that the SHO, PW-2, in his presence had taken into his possession 100 plastic bags of charas weighing 2000 kgs but he did not say that what was the total quantity of the contraband substance so separated for analysis in the FSL, yet Sher Afsar Khan,

SHO, PW-2, in his cross examination, stated that he had taken into his possession the contraband substance weighing 4000 kgs. This PW did not remember the exact time of his departure from the Police Station. Through he claimed his presence on the spot at the relevant time, but no extract from the daily diary showing his departure from the police Station for duty has been attached to the case file, so as to justify his presence on the spot. If the assertion of PW-1, that "in his presence the SHO, PW-2 had taken the contraband substance weighing 2000 kgs" is taken to be correct, then the narration of PW-2 turns out to be false and incorrect. Similarly, if the assertion of PW-2 that "he has taken the contraband substance weighing 4000 kgs" is taken to be correct, then the narration of PW-1 tends to ring false. No doubt, the contraband substance was recovered on 30.05.2011 but the logic that the samples prepared for analysis on the same day, received in the FSL on 02.07.2011 is not understandable. Even, the delay in sending has not been plausibly explained by the prosecution, so as to prove its safe custody, transmission and handing over of the same to the chemical Laboratory and thus such report cannot be taken as plus point to be relied upon in favour of the Prosecution. In this state of affairs neither the version of PW-1 nor the version of PW-2 deserves implicit reliance, that too, when they disagree with each other on material particulars. Apart from the above, the statement of the appellant recorded under section 342 Cr.P.C viewing that the Excise and Customs Authorities found a tanker in an abandoned condition and handed over

the same to the local police. He further stated that the he along with two others, being strangers, mere deboarded from Flying Coach near Jehangira Police Post, but they were brought to the Police Station Lahor and later on they were involved in the instant case. The assertion made in the statement of the appellant cannot be ignored altogether simply because the appellant, according to the FIR, happened to be a driver, that too, when he categorically denied the story projected in the FIR as well as in the statement of the witnesses produced by the Prosecution. Though the appellant was intensively interrogated but nothing was found during the investigation as could point out to his involvement in the crime. In the absence of any corroboratory evidence, it would not be in accord with the safe administration of justice to maintain the conviction of the appellant, especially when it is, all the more, easy to project such plantation of the substance in a vehicle. When no such evidence is available on the record to connect the appellant with the crime, we doubt and have reservation about the genuineness of the recovery as shown in the Prosecution version. It would be rather dangerous to rely on this nature of evidence in a case seems to be projected by the Prosecution. No evidence is available to the effect that who took the parcels to the Laboratory, where and with whom the same were laying for 33 days and thus the possibility of tampering with the same, could not be ruled out. Reliance can be placed on the judgment rendered in the case of **Fayaz Shah Vs the State (2015 YLR 2189, Peshawar)**. In the Prosecution case

not only the report submitted by the Chemical Examiner was legally laconic but the safe custody of the recovered substance as well as safe transmission of the separated samples to the FSL had also not been established by the Prosecution. It is not disputed that the Investigating Officer appearing before the learned trial Court had failed even to mention the name of the police official who had taken the samples to the Laboratory and admittedly no such police official had been produced before the learned trial Court to depose about the safe custody of the samples entrusted to him for being deposited in the FSL. In this view of the matter, the Prosecution had not been able to establish that after the alleged recovery the substance so recovered was either kept in safe custody or that the samples, taken from the recovered substance, had safely been transmitted to the Laboratory without the same being tampered with or replaced while in transit. The judgment rendered in the case of **Ikramullah and others Vs the State (2015 SCMR 1002)** can well be referred in this behalf.

8. Though, according to the Prosecution version, the appellant was driving the tanker while the other co-accused was sitting with him on the front seat but no evidence is available on record to show that they were either owners of the vehicle or owners of the contraband substance recovered from its secret places or that they knew about the concealment of the contraband in the vehicle, mere passive presence of the appellant in the tanker is not enough for his conviction in the

absence of reliable evidence about transportation of the contraband substance by him, especially when the Investigation Agency did not bother to find out the owner of the tanker or contraband substance recovered from the vehicle and the Agency appeared to have acted with ulterior motive to save the real accused. In the case of "**Zahoor Ahmad Awan and another Vs the State" (1997 SCMR 543),** the Hon'ble Supreme had also taken the same view.

9. It is also not disputed that whenever a vehicle is entered to motorway, a card is handed over to the holder of the vehicle at Toll Plaza and similarly on its exit, another receipt showing the duration spent on motorway, is handed over to the same person but here it is not the case of the Prosecution. The Prosecution has failed to check the concerned Toll Plaza or bring on record the card given to the vehicle at entrance point so as to establish the presence of the tanker on motorway where the raiding party fenced the road and seized the vehicle. Such failure on the part of the Prosecution also reacted against the reliability of the version narrated in the FIR as well as in the statement of the PWs. When this is the quality and quantity of the evidence, we are afraid; it would not be in accord with safe administration of justice to maintain the conviction and sentence recorded by the learned trial Court. Needless to say that even a single doubt, if found reasonable, is sufficient to warrant the acquittal of the accused.

10. For the reasons discussed above, we have no hesitation to hold that the charge against the appellant has not been

> proved beyond any shadow of reasonable doubt. We, therefore, allow this criminal appeal, set aside the convictions and sentences recorded by the learned trial Court and acquit the appellant of the charges levelled against him. He be set free forthwith, if not required in any other case."

6. As stated above, on the same set of evidence, which has been disbelieved by this Court while hearing appeal of co-accused vide above mentioned judgment, conviction of the appellant has been recorded by the learned trial Court through one and the same judgment, but the present appellant did not file any appeal. The judgment/findings of this Court in the judgment (supra) regarding acquittal of co-accused, who had identical role as that of the appellant, have not been questioned/assailed by the prosecution/complainant before the Hon'ble Apex Court, therefore, has attained finality. Not only an identical role has been attributed to both the accused, but they were tried together and convicted and sentenced through one and the same judgment dated 24.05.2012. In such a situation, the case of present appellant cannot be treated differently, particularly, when the impugned judgment has already been set-aside by this Court in case of co-convict. In case titled, ***"Amin Ali and another Vs the State" (2011 SCMR 323),*** the august Supreme Court, while accepting appeal of convicts, not only acquitted them but also acquitted co-convict who had not preferred appeal, by extending benefit of the same judgment.

7. For the reasons discussed above and placing reliance on the judgment (supra) of the august Supreme Court, we by allowing this appeal, set-aside the conviction and sentence of the appellant (Israr Khan), recorded by the learned trial Court, vide judgment dated 24.05.2012 and hereby acquit him of the charge levelled against him. He be set at liberty, forthwith, if not required to be detained in any other case.

8. Above are the reasons of short order of even date.

Announced
07.11.2019

J U D G E

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Amjad PS DB Hon'ble Mr. Justice Lal Jan Khattak & Hon'ble Mr. Justice Ahmad Ali