

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

Cr. A No.242-P/2020

Shah Nawaz son of Dad Khan,
r/o Balarzai Badh Ber Peshawar.

Appellant (s)

VERSUS

The State

Respondent (s)

For Appellant (s) :-

Mr. Shahab Khattak, Advocate.

For State :-

Ms. Sophia Noreen, AAG.

Date of hearing:

13.12.2022

JUDGMENT

ROOH-UL-AMIN KHAN, J:- This criminal appeal under Section 48 Control of Narcotic Substances Act, 1997 (“Act of 1997”), filed by Shah Nawaz, the appellant, is directed against the judgment dated 22.02.2020, passed by learned Sessions Judge/Judge Special Court, Peshawar, whereby he has convicted the appellant under section 9 (c) of the Act of 1997 and sentenced him to undergo imprisonment for life and to pay a fine of Rs.3,00,000/- or in default thereof to further undergo one year simple imprisonment, vide case FIR No.1297 dated 19.09.2015, registered under Section 9 (c) of the Act of 1997 at Police Station Hayatabad, Peshawar.

2. The prosecution’s case as unfolded in the First Information Report (“FIR”) Exh.PA is that on 19.09.2015 at 1430 hours, Shakeel Khan ASI (PW.4) along with other police officials during *Nakabandi* at Jamroad, intercepted an Alto Motorcar bearing registration No.LZN.4086, driven by Shah Nawaz Khan, the

for the State

appellant, and recovered 15 packets of chars Pukhta, each weighing 01 Kilogram, total 15 Kilograms, from secret cavities made beneath the driver's and front seats. He separated 05 grams from each packet as samples 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 motorcar vide recovery memo Exh.PW.2/1. He issued arrest card of the appellant, drafted Murasila Exh.PA on the basis of which FIR Exh.PA was registered against the appellant. One Hakeem Ullah was also made as accused in light of police statement of the appellant, who allegedly was owner of the recovered contraband narcotics.

3. On completion of investigation challan was submitted against the appellant before the learned trial Court, where he was formally charge sheeted to which he pleaded not guilty and claimed trial. To prove its case, the prosecution examined as many as six witnesses. After closure of the prosecution 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 or to produce evidence in defence. On conclusion of trial, the learned trial Court, after hearing both the sides convicted and sentenced the appellant under section 9 (c) of the Act of 1997 to undergo ten years rigorous imprisonment vide judgment dated 14.04.2018, against which the appellant filed Cr.A. No.72-P of 2019, which was disposed off by this court in the terms that impugned judgment was set aside on the

Lawrence Sani

ground of sentence awarded to the appellant being not in accordance with the provisions of section 9 (c) of the Act of 1997 and consequently, the case was remanded to the learned trial court for re-writing judgment as well as re-appreciating the evidence on record vide judgment dated 05.11.2019.

4. On receipt of record after remand, the learned trial court after hearing both the sides has convicted and sentenced the appellant as mentioned in the initial paragraph of this judgment, hence, this appeal.

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

6. It appears from record that incident in this case has taken place on 19.09.2015 at 1510 hours. Shakeel Khan ASI Seizing Officer while appearing as PW.1 in his examination-in-chief reiterated the same story of arrest of the appellant and recovery of contraband narcotics from secret cavities made in motorcar driven by the appellant at the relevant time as well as the proceedings conducted by him at the spot, which has already been referred in the earlier part of this judgment, therefore, his examination-in-chief is not referred again. In cross-examination he stated that the occurrence has taken place at Jamroud Chowki where they had conducted Nakabandi, however, he could not produce daily diary maintained in the said Check Post. He stated that he had not recovered CNIC or other documents from the appellant regarding his identity. In the next breath he admitted that he has mentioned

Hasim Sami

CNIC and mobile number of the accused in the Murasila. He also admitted that application to the FSL regarding chemical analysis of the samples is not available on file. He further stated that he sent the Murasila Exh.PA/1 to the Police Station through Constable Sardar. Contrary, constable Sardar Ali while appearing as PW.2 has not stated a single word about taking of Murasila from the spot to the Police Station or taking samples and case property to the Police Station rather he has deposed that he is marginal witness to recovery memo Exh.PW.2/1 vide which the seizing Officer took into possession Alto Motorcar bearing Registration No.LZN 4086 and 15 packets of chars in his presence. In cross-examination he has totally shattered the prosecution's case by deposing that the moment he was signing the recovery memo Exh.PW.2/1, FIR number, date and Police Station as well as section of law were mentioned in the recovery memo. Contradicting the statement of the Seizing Officer, PW.2 further stated that they had made entry in daily diary on the day of occurrence. He stated that as the Check post was permanent therefore they remained there till 9.00 P.M. Shakeel Khan ASI, Seizing Officer (PW.4) has not stated a single word as to how and through whom the samples in parcels No.1 to 15 were sent to the Police Station from the spot and thereafter its onward transmission to the FSL. Similarly, his testimony is also silent about parcel No.16 containing case property that to whom the same was handed over by him. Contrary, Imran Habib Khan ASI (PW.5) deposed that on the basis of Murasila he registered FIR Exh.PA and Shakeel Khan ASI handed over him parcels No.1 to 15 for sending the same

look in Samir

for sending the same to the FSL and parcel No.16 for keeping the same into Malkhana in the Police Station. In cross-examination he stated that his statement was not recorded by the Investigating Officer under section 161 Cr.P.C. regarding receiving of parcels on the eventful day, rather the same was recorded on 15.10.2015. It is manifest from record that the samples have been sent to the FSL on 28.09.2015 through constable Mustafa. The extract of Register No.19 has also not been exhibited during trial. Haji Rehman SI (PW.6), who has conducted investigation in the case in cross-examination has stated that he examined the recovered contraband narcotics in Police Station, after his return from the spot. He also admitted that application to the FSL with regard to samples is not available on file. He further admitted it correct that up to 28.09.2015, the samples were in the custody of Moharrir of Police Station. Constable Mustafa Khan PW.1, in cross-examination has admitted that he had taken the samples to the FSL on 28.09.2015 i.e. after a delay of about 9 days for which no explanation, much less plausible has been furnished by the prosecution. Similarly, as application to FSL is not available on file, therefore, it is uncertain that when the samples were handed over to Constable Mustafa for its onward transmission to the FSL.

7. The contradictions in the testimony of the prosecution's witnesses referred above create serious doubts in the prosecution's case. Similarly, the chain of safe custody of samples from the spot till its receipt in the FSL also remained unproved. In the judgment

Lashin Sami

reported as (2018 SCMR 2039), the Hon'ble Supreme Court has held that:-

"Chain of custody began with the recovery of the sized drug by the police and included the separation of the representative sample(s) of the seized drug and their dispatch to the Narcotics Testing Laboratory. Said chain of custody was pivotal as the entire construct of the Control of Narcotic Substance Act, 1997 and the Control of Narcotic Substances (Government Analysts) Rules, 2001 rested on the report of the Government analyst, which in turn rested on the process of sampling and its safe and secure custody and transmission to the Laboratory. Representative samples of the alleged drug must be in safe custody and undergo safe transmission from the stage of recovery till it is received at the Narcotics Testing Laboratory. Prosecution must establish that the chain of custody was unbroken, unsuspecting, indubitable, safe and secure. Any break in the chain of custody or lapse in the control of possession of the sample, would cast doubts on the safe custody and safe transmission of the samples(s) and would impair and vitiate the conclusiveness and reliability of the report of the Government Analyst, thus, rendering it incapable of sustaining conviction. (emphasis supplied).

8. In case titled, "Abdul Ghani and others vs the State and others" (PLJ 2019 SC (Cr.C) 462) the Hon'ble supreme Court, without discussing the merits of the case, on the sole ground of missing chain of safe transmission of the samples from the spot till receipt in the FSL and non-production of the relevant witnesses in whose custody the samples remained, allowed the appeal and acquitted the convicts/appellant by setting aside the concurrent findings of the two courts below.

Madhukar Singh

9. Besides, the occurrence has taken place on 19.09.2015 whereas, the samples have been sent to the FSL on 28.09.2015. The prosecution has not furnished any explanation much less plausible with regard to the delay. As stated earlier, application to the FSL with regard to samples is also not available. This aspect also creates serious doubt in the prosecution's case. Similarly, the FSL report Exh.PZ reveals that Chemical Examiner has not specified protocols of the test applied to each sample which was the mandatory requirement under Rule 6 of the Government Analysts) Rules, 2001. In judgment dated 18.12.2019, rendered in case titled, Qaiser Javed Khan vs the State through Prosecutor General Punjab Lahore and another" the Hon'ble apex Court has held that:-

"The report of the Government Analyst in the instant cases 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 Imam Bakhsh and Khair ul Bashir (supra). The said Report cannot be relied upon for conviction of the petitioner. Therefore, the petition is converted into appeal and allowed. The conviction and sentence of the petitioner are set aside. He shall be released forth if not required to be detained in any other case".

10. The prosecution's case suffers from the same legal defects as highlighted by the Hon'ble apex Court in the judgments (supra), therefore, this appeal is allowed. Conviction and sentence of the appellant recorded by the learned trial Court through impugned judgment are hereby set-aside and he is acquitted of the charge leveled against him. He be set at liberty forthwith, if not detained in any other case.

Lookus Say

11. These are the reasons of our short order of even date,
which is reproduced below:-

“For reasons to be recorded later, we allow this appeal, set-aside the conviction and sentence of appellant Shah Nawaz, recorded under section 9 (c) Control of Narcotic Substances Act, 1997, by learned trial Court/Judge Special Court, Peshawar vide judgment dated 22.02.2020, in case FIR No.1297 dated 19.09.2015, registered under section 9 (c) CNS Act, 1997, at Police Station Hayatabad, Peshawar and hereby acquit him from the charge leveled against him in the cited case. The appellant be set at liberty forthwith, if not confined in any other case.

Announced:
13.12.2022
M.Siraj Afridi CS


Senior Puisne Judge


JUDGE

DB of Mr. Justice Rooh ul Amin Khan Hon'ble Senior Puisne Judge;
And Hon'ble Mr. Justice Syed Arshad Ali