Judgment Sheet

IN THE PESHAWAR HIGHCOURT, PESHAWAR

Judicial Department

Cr.A No. 832-P/2017
Asad Vs the State

Date of hearing: 03.12.2019

Ms. Zohra Durrani, Advocate, for the appellant.

Ms. Sofia Noreen, AAG, for the State

JUDGMENT

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AHMAD ALI, J. This common judgment shall also decide the connected appeal against acquittal (**Cr.A No.289-P/2017 titled "State Vs Iftikhar"**) being outcome of one and the same judgment dated 24.02.2017. The appellant (Asad s/o Mir Dad) has called in question the said judgment of the learned Additional Sessions Judge-XIV/Judge, Special Court, Peshawar, whereby the appellant was convicted and sentenced to life imprisonment with fine of Rs.100,000/- or in default thereof to suffer six months S.I, in case FIR No.616 dated 14.11.2012 u/s 9-C CNSA, Police Station, Sarband (Peshawar), whereas, accused-respondent in the above referred acquittal appeal (Iftikhar) was acquitted.

2. Brief facts of the case, as per prosecution's version, are that on the eventful day, the complainant/PW-5 (Safdar Khan, SHO), received spy

information regarding smuggling of narcotics from tribal territory via Ring Road, through motorcar/Daewoo bearing Registration # LPT-7620. Pursuant to said information, he laid Nakabandi at the spot. In the meanwhile, the vehicle in question came from Bara Tribal Territory, which was stopped. On query, the driver disclosed his name as Asad (present appellant), whereas, the person occupying its front seat disclosed his name as Kamran (later on found to be Iftikhar/respondent in the connected appeal). Search of the vehicle led to the recovery of 28 kgs of charas contained in 28 packets (1000 grams each), hidden in the secret cavities of the vehicle. 5/5 gram from each packet were separated for chemical analysis of FSL and sealed into parcel No.1 to 28 whereas the remaining contraband was sealed in another parcel No.29 duly stamped with "SK" monograms. On the basis of Murasila (Ex.PA/1), the instant FIR (Ex.PA) was lodged against the accused.

3. On completion of investigation, complete challan against the accused-appellant and acquitted co-accused was submitted in Court where they were charge-sheeted, however, they pleaded not guilty and claimed trial. The prosecution in order to prove its case, produced and examined as many as **five** witnesses whereafter statement of the accused were recorded, wherein, they professed their innocence.

4. The learned Trial Court, after conclusion of trial, found the appellant guilty of the charge and, while recording his conviction, sentenced him as mentioned above. Feeling aggrieved, the appellant has filed the instant appeal before this Court, whereas, co-accused (Iftikhar) was acquitted from the charge and against his acquittal, the State has preferred the connected appeal. That is why both the appeals are taken together for disposal.

5. Arguments heard and record gone through.

6. Allegation against the appellant is that, 28 kgs of charas were recovered from the vehicle driven by the appellant when he was accompanied by the acquitted co-accused.

7. The Seizing Officer while appearing before the Court as PW-5. Some of the important portions of his statement are reproduced below for ready reference:-

PW-5

> **"I separated five grams charas from each packet for FSL and sealed into parcels No.1 to 28 while the remaining charas already Ex.P1 was sealed into parcel No.29 b affixing 3/3 seals of SK monograms. The contraband alongwith motorcar and duplicate registration were taken into possession through recovery memo already Ex.PC in presence of marginal witnesses. I drafted the murasila Ex.PA and sent the same to the Police Station for registration of case. Similarly, I have also issued card of arrest of both the accused Ex.PW5/1. I have also drafted an application Ex.PW5/2 for sending the samples to the FSL.**

> **XX….The murasila was dispatched through constable Naseer to the Police Station in private vehicle…….The contraband and motorcar was brought to the Police Station by myself. The IO was present in the police station when I brought the contraband, accused and motorcar to the Police Station. I handed over the contraband to the Moharrir for onward submission to the FSL"**

8. Contrarily, the IO of the case, while appearing before the Court as PW-1, narrated in his cross examination, as under:-

PW-1

> **"XX….The FIR was handed over to me in the police station. The case property was not handed over to me on the spot. Self stated that the case property has already been sent to the PS alongwith the murasila and recovery memo. I have conducted no personal search of both the accused. I have not found during my investigation regarding the ownership of the accused facing trial which connect them with the commission of offence. I have personally examined the secret cavities in the vehicle in question. It is correct that the secret cavities were closed during my examination. Self stated that the complainant recovered the charas and they closed the secret cavities. It is correct that nothing regarding the offence such as case property, accused or other incriminating recovered by the complainant, handed over to me by the complainant for investigation. Self stated that the accused was already in the police lock up and the case property was shown to me by the Moharrir of the PS which was lying in the police station."**

PW-1/IO has clearly contradicted PW-5/Complainant on certain material points, which creates serious doubts in the version of prosecution with regard to mode and

manner of the occurrence. PW-2 is the scriber of FIR, who affirmed receipt of murasila from Naseer constable, but negated the stance of PW-1/IO regarding transmission of Murasila alongwith case property. This witnesses has not offered any word regarding receipt of any case property. PW-5, though, categorically narrated the story of recovery and seizure of the contraband and stated that the contraband was handed over to the Moharrir of the police station for onward submission to the FSL, but to our utter surprise, no such Moharrir was ever produced before the Court. Similarly, FC No.2391, who took the samples to FSL, was also not examined during the trial. Record further suggests that one of the PW, namely, Shaukat Kamal, ASI, who was the 2nd marginal witness to the recovery memo, was also not examined for unknown reasons. All these important witnesses, being associated with the recovered contraband at the relevant time, were not produced before the Trial Court. In the situation, not only adverse inference under Article 129(g) of Qanun-e-Shahadat Order 1984 could be safely drawn, but legal inference could also be drawn that if these witnesses had entered into the witness box, they would have not supported the prosecution case.

9. There is also no record or any assertion that the samples and case property were ever kept in Malkhana. Had it been, the Register No.19 would have been

examined. In this situation, the safe custody of the samples and case property is not proved. Guidance could be sought from case law reported in **2019 SCMR 608** wherein it was held by the apex Court that;

> "***In a case where safe custody of the recovered substance or safe transmission of samples of the recovered substance was not proved by the prosecution through independent evidence, it could not be concluded that the prosecution had succeeded in establishing its case against the accused beyond reasonable doubt***".

Similar views have also been taken by the apex Court in ***2018 SCMR 2039, & 2019 SCMR 903***.

10. Record further reveals that the contraband was recovered on 14.11.2012 whereas the samples were received in FSL on 16.11.2012 with a considerable delay of about three days from an unnamed official. The prosecution could not offer any plausible explanation for such delay. Reliance is placed on case titled ***"Ikramullah and others Vs the State reported in 2015 SCMR 1002"*** wherein the Apex Court has held that;

> **"No such police official was produced before Trial Court to depose about safe custody of samples entrusted to him for being deposited in office of Chemical Examiner--- Prosecution was not able to establish that after alleged recovery of substance so recovered was either kept in safe custody or that samples were taken from recovered substance had safely been transmitted to office of Chemical Examiner without the same being tampered with or replaced while in transit---Prosecution failed to prove its case against accused persons beyond reasonable doubt"** .

11. Thus, the prosecution has not only miserably failed to establish the safe custody of the case property, but also failed to prove the safe transmission of the

samples to FSL. In a case where safe custody of the recovered substance or safe transmission of samples of the recovered substance was not proved by the prosecution through independent evidence, it could not be concluded that the prosecution had succeeded in establishing its case against the accused beyond reasonable doubt. Wisdom can be derived from the case law reported in **2019 SCMR 608**.

12. Apart from the above, the vehicle, from which the alleged recovery was effected, was not produced before the Court and was not exhibited during trial as, according to PW-5/complainant that the said motorcar was in damaged condition and in this regard only a naqal mad (Ex.PW5/3) was exhibited, which shows that the police had malice towards the accused regarding recovery of the contraband. Its production 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. Reference is made to case law reported in **2017 P.Cr.L.J 14**.

13. As, the prosecution has brought nothing on record in respect of any nexus of the appellant with the alleged contraband as well as vehicle in question, therefore, he cannot be held responsible for the same. It seems that the

prosecution, for saving the neck of actual culprit, has falsely dragged the present appellant in the instant case.

14. Keeping in view the contradictions on material points occurred in the statements of PWs and handling of the contraband as hinted above created doubts in the prosecution case qua its recovery and safe custody, which suggests that occurrence has not taken place in the mode and manner as alleged by the prosecution.

15. The above discussion has led this Court to believe that the learned trial court has erred in appreciating the case evidence in its true perspective. It has been held, time and again by the superior courts, that a slightest doubt occurs in the prosecution case is sufficient to acquit an accused. For extending the benefit of doubt, it is not necessary that there should be many circumstances creating doubts. Single circumstance, creating reasonable doubt in the prudent mind about the guilt of accused, makes him entitled to its benefit, not as a matter of grace or concession, but as a matter of right. Reliance could be placed on **2009 SCMR 230, 2011 SCMR 664, 2011 SCMR 646, 1984 PLD SC 433, 2012 MLD 1358, 2007 SCMR 1825, 2008 P.Cr.L.J 376, 1994 PLD Peshawar 114, 2012 PLD Peshawar 01, 1999 P.Cr.L.J 1087, 1997 SCMR 449, 2011 SCMR 820 & 2006 P.Cr.L.J SC 1002**. The conclusions drawn by the learned trial Court are not borne out of the case

evidence, therefore, the impugned judgment is not sustainable.

16. For what has been discussed above and while extending benefit of doubt to the appellant, instant appeal is allowed, the impugned judgment is set aside and the appellant is acquitted of the charge levelled against him. He be set at liberty forthwith, if not required to be detained in any other case.

17. As we have allowed the instant appeal, therefore, the connected criminal appeal (Cr.A No.289-P/2017) preferred by State, stood meritless, which is dismissed, accordingly.

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

Announced
03.12.2019

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