Judgment Sheet
PESHAWAR HIGH COURT, BANNU BENCH
(Judicial Department)

Cr.A No.86-B of 2023

State through Advocate General
Khyber Pakhtunkhwa

Vs

Aqil Muhammad

JUDGMENT

For appellant: **Hafiz Muhammad Hanif, Addl. A.G.**

For respondent: **In motion**

Date of hearing: **04.05.2023**

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DR. KHURSHID IQBAL, J.--- The respondent (Aqil Muhammad), was tried by Additional Sessions Judge-V/Judge Special Court, Bannu, for the offence under section 9(c) of the Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019 (the Act 2019) read with 15-AA in case FIR No.599 dated 18.05.2022 of Police Station Kakki, District Bannu. He was acquitted of the charges vide judgment dated 13.10.2022.

2. Facts, shortly, are that on 18.05.2022 at 10:00 hours, complainant Asmat Ullah Khan, PASI, along with a police contingent was present on duty. Meanwhile, he received spy information regarding trafficking of narcotics by the respondent-accused from Gambali. In response, he laid barricade at the spot. After some time, the respondent-accused reached there with a plastic shopper in his hand. He was stopped and searched. Charas weighing 1025 grams were recovered from the plastic bag. A .30 bore pistol with fit magazine containing 05 live rounds was also recovered from

the fold of his trouser, regarding which no license was produced on the spot. The contraband along with the pistol was taken into possession vide recovery memo Ex.PW-2/1. The respondent-accused was arrested and murasila was drafted, which was converted in the shape of FIR.

3. After completion of investigation, challan was put for trial against the respondent. Copies were supplied to him under section 265-C Cr.P.C. Charge was framed against him, to which he pleaded not guilty and claimed trial. The prosecution examined a total of 07 witnesses and then closed its evidence. The respondent recorded his statement under section 342 Cr.P.C, in which he denied all the allegations leveled against him and professed innocence. However, he didn't avail the opportunity to record evidence in defence or to give statement on oath within the meaning of section 340(2) Cr.P.C. The learned trial Court after hearing arguments, acquitted the respondent of the charges vide impugned judgment dated 13.10.2022. Hence, this appeal.

4. Arguments of Hafiz Muhammad Hanif, A.A.G for the State, heard and record gone through.

5. The prosecution case is that the seizing officer received spy information regarding trafficking of contraband by the respondent-accused. In response, a barricade was laid where the respondent-accused was caught red handed with 1025 grams of Charas and an unlicensed pistol. The seizing officer being one of the star witnesses was examined as PW-02. In his cross-examination, he admitted that the spy information was received at about 11:00 a.m. The time of the occurrence was shown as 09:40 a.m. So, when the occurrence had already taken place at 09:40 a.m, then how the information regarding involvement of

the respondent-accused in commission of the offence was received to the seizing officer at 11:00 a.m. On the one hand, the seizing officer was of the view that the respondent-accused was trafficking contraband, whereas, on the other, he claimed that the respondent-accused was busy in selling charas and that a customer was also present with him. This stance of the seizing officer is not only self-contradictory, but also negates what he has mentioned in the FIR. PW-03 deposed that none told the police contingent regarding selling of the narcotics by the respondent-accused, yet the seizing officer claimed that he was selling charas at the time of recovery. The marginal witness (PW-02) not only contradicted the testimony of the seizing officer, but also the contents of the FIR. The total quantity shown recovered was 1025 grams, while the marginal witness claimed it in his cross examination as 150/240 grams. Though, the contradiction was termed a mistake by the Additional Advocate General. However, the record is silent regarding any application made by the prosecution for correction. In the circumstances, the contention of the Additional Advocate General holds no water. The marginal witness (PW-03) even shown ignorance as far as the place of the recovery is concerned. Needless to say, the marginal witnesses being present on the spot are supposed to be aware of all the material aspects of the case. However, in the case in hand, the marginal witnesses even failed either to disclose the exact quantity shown as recovered or the place of recovery. Again, the seizing officer and the investigating officer are in conflict as regards the time period which they spent together in connection with completion of investigation. The former disclosed the time as two hours, whereas, the latter as one hour.

6. The recovery was shown as having effected on

18.05.2022. But the sample separated from it, was sent to the FSL on 24.05.2022. Thus, there is a delay of about 06 days in sending the representative sample to the FSL. Relevant in this regard is Rule 4(2) of the Control of Narcotic Substances (Government Analysts) Rules, 2001, which provides for the completion of such exercise within 72 hours of the recovery. The delay caused has not been plausibly explained, so keeping it in juxtaposition with the aforementioned facts and circumstances, the same could be considered as fatal to the prosecution case. This Court in the case of ***"State through Advocate-General Khyber Pakhtunkhwa, Peshawar Vs Javed Iqbal" (2021 YLR 662 Peshawar)*** has held that:

> "It is also an admitted fact that recovery of contraband was made on 18.01.2008, the application for sending the samples to chemical examiner was drawn and handed over to Asif constable (PW-5) on the same day as admitted by him in his cross-examination, however, it was taken by hand in Forensic Science Laboratory, Peshawar on 23.01.2008, no reason what so ever was given by the said prosecution witness for retaining the samples with him for a period of five (05) days, therefore, the delay in taking the sample to the laboratory is another important defect in the prosecution case and there is nothing on record to show that the samples of chars remained in safe custody during intervening period. (i.e. 18.01.2008 to 23.01.2008) which makes the FSL report highly doubtful and any doubt arises in the links of the chain of prosecution story, the benefit of the same must go to the accused."

7. As far as the recovery of pistol is concerned, suffice it to

say that it was effected in a populous area, but none from the general public present was cited as a witness. Though, the police officials are as good witnesses as others, but when private persons were available, then an attempt should have been made to ensure fair and transparency. Moreover, no arms expert report was brought on record to confirm the working condition of the weapon. Keeping in view this aspect of the case vis-à-vis the contradictions and inconsistencies noted above, we are clear in our mind that the prosecution has badly failed to prove the charge against the respondent-accused beyond any reasonable doubt.

8. It is well settled principle of criminal jurisprudence that prosecution has to prove its case the person accused beyond reasonable of doubt and if any inconsistency, loophole or contradiction arises in the prosecution case, then its benefit has to be extended to the accused, not as a matter of grace or concession, but as of right. In case titled ***"Ahmed Ali and another Vs The State" (2023 SCMR 781)***, it was held that:

> "Even otherwise, it is well settled that for the purposes of extending the benefit of doubt to an accused, it is not necessary that there be multiple infirmities in the prosecution case or several circumstances creating doubt. A single or slightest doubt, if found reasonable, in the prosecution case would be sufficient to entitle the accused to its benefit, not as a matter of grace and concession but as a matter of right."

9. In the case of ***"State Vs Ahmed Omar Sheikh" (2021 SCMR 873)***, the apex Court held that the parameters to deal with an appeal against conviction and an appeal against acquittal are totally different. The reason is that acquittal carries

double presumption of innocence and the same could be reversed only when found blatantly perverse, illegal, arbitrary, capricious or speculative, shocking or rested upon impossibility. If there is a possibility of a contrary view, even then acquittal could not be set aside. As on one hand, the prosecution has badly failed to prove the charge against respondent-accused, whereas, on the other, nothing as such could be pointed out to prove that the impugned judgment is perverse, illegal or arbitrary. The learned trial Court after evaluating the entire record has taken into consideration all the crucial aspects of the case and has arrived at a correct and just conclusion that the prosecution case is doubtful and it does not inspire confidence to support the charge.

10. For the above reasons, this criminal appeal is found bereft of any merit. The same is, therefore, dismissed in *limine*.

Announced
04.5.2023
(Ghafoor Zaman)

JUDGE

JUDGE

(D.B)
Hon'ble Mr. Justice Fazal Subhan
Hon'ble Mr. Justice Dr. Khurshid Iqbal

16/5/23
6 MAY 2023