

SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Justice Jamal Khan Mandokhail
Justice Musarrat Hilali
Justice Shakeel Ahmad

Cr.P.L.A No. 219-P of 2023

(Against the judgment dated 16.11.2023 passed by the Peshawar High Court, Peshawar in Cr.A No. 787-P of 2022)

Irshad Khan

... Petitioner

Versus

The State

...Respondent

For the Petitioner : Syed Mubashir Shah, ASC.

For Respondent(s) : Mr. Nouman UI Haq, Addl. Advocate General, Khyber Pakhtunkhwa.

Date of hearing : 12.08.2025

ORDER

Shakeel Ahmad, J.- This Criminal Petition for Leave to Appeal filed under Article 185(3) of the Constitution of the Islamic Republic of Pakistan, 1973, is directed against the judgment dated 16.11.2023 of the Peshawar High Court, Peshawar ("***the High Court***"), whereby the appeal filed by the petitioner was dismissed and his conviction and sentence of rigorous imprisonment for life with fine of Rs. 600,000/- recorded by the trial Court in Crime No. 230 dated 31.08.2021, registered under Section 9-D KP CNSA, 2019 at police station IDS, Swabi, were maintained.

2. The prosecution's case, as set forth in the Crime report, is that on 31.08.2021, the complainant alongwith other police contingents (NET squad), laid a *nakabandi* at the crime scene. In the meanwhile, a Datsun bearing registration No. DR-3588, coming from Mangal Chai, loaded with crushed stones, arrived, was intercepted. The driver of the vehicle, namely Irshad (the present petitioner), was boarded. Upon his personal search, no incriminating article was recovered; however, search of the Datsun led to the recovery of white sacks of sugar, wherefrom 20 chunks of opium wrapped in yellow insulation tape and three packets of *chars pukhta* were recovered, which,

upon weighment, came out to be 24885 grams of opium and 3013 grams of *chars*. Test samples were separated from each piece (*tikya*), as such, the remaining case property was packed and sealed into different parcels. The case property was shifted to the police station, and so the accused alongwith the vehicle. The test samples were sent to the office of the Chemical Examiner, and a positive report in this respect was received. The accused-petitioner disclosed that the recovered narcotics is the ownership of Arshad, son of Momin; consequently, he was also booked in the Crime report.

3. On completion of the investigation, *challan* was submitted. To substantiate the charge, the prosecution examined as many as five witnesses. The accused was examined under Section 342 Cr. PC, however, he did not produce evidence in defence. At the conclusion of trial, the accused-petitioner was adjudged guilty of the offence by the trial Court, convicted, and sentenced vide judgment dated 30.07.2022, as under: -

Under Section 9-D, KP CNSA, 2019, to rigorous imprisonment for life with a fine of Rs. 600,000/- (Six Hundred Thousand only). In case of failure to pay the fine, he was directed to further undergo SI for six months. Benefit of Section 382-B Cr.PC was also extended to him.

His co-accused, namely Arshad Zaman, was acquitted of the charge through the same judgment.

4. The accused-petitioner challenged his conviction and sentence before the High Court through Cr.A No. 787-P of 2022, which was dismissed vide impugned judgment dated 16.11.2023. Aggrieved thereof, he has filed the instant petition.

5. It was argued by the learned ASC for the accused-petitioner that the prosecution has miserably failed to establish guilt of the accused-petitioner beyond a ray of doubt as the prosecution's evidence is pregnant with contradictions and discrepancies. He next maintained that the accused-petitioner is innocent and has falsely been implicated in the alleged crime. He added that during the trial, neither Register No.19 nor Register No. 21 was produced in original; the vehicle, wherefrom the

alleged contraband was recovered, was neither produced nor exhibited; and the samples of the narcotic were not examined separately by the Chemical Examiner. On the basis of the above deficiencies in the prosecution evidence, the learned ASC submitted that the accused-petitioner deserves outright acquittal.

6. As against this, the learned Additional Advocate General, Khyber Pakhtunkhwa, submitted that the prosecution has succeeded in proving the case against the accused-petitioner beyond any shadow of doubt. According to him, there is no inconsistency in the prosecution's case. He next submitted that the prosecution has proved safe transmission of the case property to the police station and onward transmission to the FSL through PW-3.

7. Heard both sides and record perused.

8. It is well-recognized principle of criminal jurisprudence arising out of the maxim "*communi observantia non est recedendum*" that when the law prescribes a specific procedure, it must be followed accordingly; any deviation renders the act questionable. In this context, reference may be made to the case of *Noman Mansoor*¹. This Principle is applied more stringently in the cases arising out of special enactments like the "*Khyber Pakhtunkhwa Control of Narcotics Substance Act, 2019*", which prescribes severe punishment to the accused, therefore, it requires concrete and strong evidence to bring home guilt of the accused. Reference may be made to the cases of *Ahmed Ali*², *Muhammad Hashim*³, and *Ameer Zeb*⁴.

9. It is alleged by the prosecution that on the relevant day and time, the complainant, Akbar Ali, Inspector (PW-1) alongwith other police contingents, had laid *nakabandi* at Bagla Road near Bagla Kandawo, 45/46 KMs away from the police station. According to the prosecution, the recovery of the contraband was witnessed by Fawad Khan, SHO police station, IDS (PW-2) and Gohar Khan, SI (given up) as is reflected from the recovery/ seizure memo (Ex.PW1/1), but neither the seizing

¹ *Noman Mansoor alias Nomi v. The State* (PLD 2024 SC 805)

² *Ahmed Ali v. The State* (2023 SCMR 781)

³ *Muhammad Hashim v. The State* (PLD 2004 SC 856)

⁴ *Ameer Zeb v. The State* (PLD 2012 SC 380)

officer nor the investigating officer (PW-4) bothered to place on record the daily diary report to show that the seizing officer alongwith other police officials had made a departure from the police station to the spot for *nakabandi* to prove their presence on the spot. Whenever a police official makes departure from the police station, he is essentially bound to record the reasons of his departure from the police station, as contemplated by Rules 22.48 and 22.49 of the Police Rules, 1934. Failure of the prosecution to produce in Court the daily diary of the police station showing departure of the police party to the spot would lead to the inference that the police party did not leave the police station and all the proceedings were carried out in the police station. Fair play demands that it should have been tendered in evidence to prove the fact that the seizing officer alongwith other police officials, left the police station to the spot.

10. A perusal of the statements of the seizing officer and marginal witness of the recovery memo, namely Fawad Khan, SHO (PW-2) reflect that the seizing officer deposed that he stopped the vehicle and searched its driver, nothing incriminating article was recovered from him, however, search of the vehicle led to the recovery of opium and *chars*. Likewise, PW-2 stated that the complainant took into possession *chars* and opium. He failed to mention that at the relevant time and day, the accused-petitioner was driving the vehicle in question, wherefrom the contraband was recovered. He did not even bother to mention the registration number of the vehicle or place of recovery. Neither the seizing officer nor any official of the police took the pain to make videography of the recovery proceedings to establish that the recovery of the contraband was made from the vehicle driven by the accused-petitioner, nor photographs for complete coverage of the crime scene were taken as contemplated by Rule 25.14 of the Police Rules, 1934. Moreso, PW-2 did not disclose the presence of other police officials, including second marginal witness of the recovery memo on the spot. The murasila (Ex.PA/1), as per the prosecution's story, was taken by Ahmad Ali, MHC, but he was not produced. Fazal Amin, MHC, was examined as PW-3, according to him, the case property was handed over to him by the seizing officer, however, the seizing officer did not utter even a single word in this respect.

Furthermore, the extracts of Registers No. 19 and 21 were tendered in evidence as Ex.PW3/1 and Ex.PW3/2, when we examined the extract of Register No. 19, it appears to be on plain paper; therefore, its exhibition was rightly objected to by the defence counsel.

11. We noticed another serious flaw in the prosecution's case regarding the forensic examination process. The FSL report Ex.PK/1 reflects that the collective analysis of twenty parcels of opium and three parcels of *chars* was given. Neither these samples were tested separately nor individual report of each sample prepared, which is violative of the principles laid down in *Ameer Zeb's case (supra)*. In our view, the collective forensic report not only reduces the credibility of the chemical examination but also raises serious doubts regarding the representative nature of the samples sent for chemical analysis. We also noticed that the recovered substance was sealed with a monogram reading as "MN", unrelated to any officer or witness involved in the case, a fact admitted by PW-2 and left unexplained by the prosecution.

12. Finding serious procedural violations, absence of credible forensic evidence, and dents in the prosecution's case, we conclude that the prosecution has not been able to prove its case against the accused-petitioner beyond a shadow of doubt. Accordingly, this petition is converted into an appeal and allowed. The impugned judgments passed by the Courts below are set aside, and the appellant is acquitted of the charges. He be set at liberty, if not required to be detained in any other case.

These are the detailed reasons for our short order of even date, reproduced below:

"For the reasons to be recorded separately, this petition is converted into an appeal and is allowed.

2. The appellant is acquitted of the charge in case FIR No. 230, dated 31.08.2021, registered under Section 9-D KP CNSA, 2019 at Police Station IDS Swabi. He be set at liberty if not required to be detained in any other case. The judgments dated

30.07.2022 and 16.11.2023 passed by the
trial Court and High Court, respectively, are
set aside”

Judge

Judge

Peshawar
12.08.2025
Zia/*

Judge

APPROVED FOR REPORTING