JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)

Cr. A No. 91-M/2024
(Muhammad Essa *Versus* The State and another)

Present: Syed Fazal Rahman, Advocate for appellant.

Mr. Haq Nawaz Khan, Additional A.G. for State.

Date of hearing: 02.05.2024

JUDGMENT

MUHAMMAD NAEEM ANWAR, J.- Through instant appeal under Section 24 of the Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019 **(The Act)**, the appellant has challenged the judgment of the learned Additional Sessions Judge/Judge Special Court, Dir Lower at Samar Bagh Camp Court Lal Qilla dated 07.03.2024 rendered in case FIR No. 04 dated 13.01.2023 of P.S Haya Serai, District Dir Lower, whereby he was convicted under Section 9(d) of the Act and sentenced to undergo 03 years R.I with fine of Rs. 500,000/-. In default of payment of fine, he was directed to suffer further six months S.I. Benefit of Section 382-B, Cr.P.C was extended to him.

2. The case of prosecution, as disclosed in the FIR, is that SHO of P.S Haya Serai namely Aurangzeb stopped the motorcycle of the present appellant on a tipoff on 13.01.2023 at nakabandi laid on the road leading from Islam Dara to Kala Daag near Service

Station Sheikh Abad at 13:55 hours. During search of the motorcycle, three packets of chars were recovered from beneath the seat. When weighed on the spot, the packets were found of 1084, 1224 and 1000 grams, as such, total 3308 grams of chars were recovered from motorcycle of the appellant. A sample of 08 grams was separated from the first packet whereas samples of 06 grams each were taken from the second and third packets and sealed in Parcel No. 1, 3 & 5 whereas the remaining contraband were sealed in Parcel Nos. 2, 4 & 6. Recovery memo was prepared, the appellant was formally arrested and the case was reported against him through *Murasila* on the basis of which the referred to above FIR was registered against him at P.S Haya Serai.

3. After completion of investigation, complete challan was put in Court for trial of the present appellant. On commencement of trial, formal charge was framed against him to which he did not plead guilty and opted to face the trial. In order to further substantiate its case against him, prosecution produced and examined as many as 13 PWs. After examination of the appellant u/s 342, Cr.P.C. the learned trial Court vide impugned judgment convicted and sentenced him in the manner as detailed in the earlier portion of this judgment, hence, instant appeal.

4. Arguments heard and record perused.

5. Learned counsel for the appellant, after giving a brief summary of the case, contended that the chain of safe custody and safe transmission of the samples is broken because prosecution has not produced the police official who had carried the samples to Forensic Science Laboratory. The learned A.A.G. representing the State, opposed the above contention of learned counsel for the appellant with the submission that the I.O had dispatched the samples to FSL through constable Hayat Khan No. 797 but he was mistakenly not examined during the trial in light of the statement of the learned APP who had abandoned HC Hayat Ullah No.641. After going through the record, it transpired that the learned APP had never abandoned constable Hayat Khan No. 797, the carrier of the samples, rather HC Hayat Ullah was abandoned in light of the statement of constable Muhammad Sohail No.1115 (PW-1). The record shows that HC Hayat Ullah and constable Muhammad Sohail are the marginal witnesses of recovery memo Ex.PW-1/1. Since one of the marginal witnesses namely constable Muhammad Sohail was examined as PW-1, therefore, HC Hayat Ullah was abandoned by prosecution. To this effect, Waheed Asim, the learned DPP recorded his statement on 03.08.2023 which is worth perusal.

PW-1 بیان کیا کہ میں گواہ حیات اللہ HC کو بوجہ یکساں بیان ہونے ہمراہ

ترک کرتا ہوں۔

Similar statement was recorded by APP Hidayat Ullah on 25.01.2024 which is as under:

بیان کیا کہ میں گواہ علی شاہ IHC کو گواہ PW-11 کے ساتھ یکساں ہونے
بیان اور گواہ حیات اللہ کنسٹیبل کو بوجہ یکساں بیان محمد سہیل ترک کرتا ہوں۔

The list of witnesses given in the final report u/s 173, Cr.P.C. reflects that constable Hayat Khan No. 797, carrier of the samples, has been marked as abandoned "Ab" with red ink but to this effect neither the statement of learned DPP nor that of the learned APP is available on record. Thus, it has become abundantly clear that the mistake occurred due to almost similar names of two witnesses of prosecution due to which constable Hayat Khan No. 797 was not examined during the trial though he had carried the samples to FSL and the same fact is duly verified by road certificate and FSL report available on record.

6. Carrier of the samples was an important witness who was mistakenly not produced before the trial Court and the mistake surfaced in the matter for the first time before this Court at the time of hearing instant appeal. Section 540, Cr.P.C. confers vast and unfettered powers on Court to summon at any stage, either suo moto or on application of either of the parties, any person and examine him as a witness or to recall and re-examine any witness whose testimony is

deemed necessary for just decision of the case. For the sake of convenience Section 540, Cr.P.C. is reproduced.

> **540. Power to summon material witness or examine persons present.** Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.

The object of the above provision is to ascertain the truth and to impart justice rather than to advance the cause of prosecution or defence. The second part of Section 540, Cr.P.C. which is mandatory in nature, makes it imperative for the Court to recall or re-examine a witness if the court considers the same exercise for just decision of the case. While doing so the question of prejudice to accused would not arise because the aim of the Court for exercising its powers so conferred upon it is to give effect to said provision for arriving at a just decision. Reliance is placed on ***"Ansar Mehmood Vs. Abdul Khaliq and another"*** ***(2011 SCMR 713)*** wherein it has been held that:

> **Survey of the law undertaken by us, in no uncertain terms, declares that powers of a Court under section 540, Cr.P.C. are widest in its amplitude; it is obligatory upon the Court to summon evidence of a material witness whose evidence is essential for just decision; the Court exercising power under section 540, Cr.P.C. has to guard itself from the exploitation and shall keep the guiding principle, what the ends of justice demands; the avoidance to fill gaps is in negation of justice, when a Court arrives at the conclusion that evidence is essential for a**

> **just decision, and, that the delay in moving an application is not relevant as the Court itself is empowered, even, without application from any of the parties to summon the witness deemed essential for just decision by applying its judicial mind.**

7. Powers of the Court under Section 540 CrPC were discussed by the Hon'ble Supreme Court in the case of ***Sajid Mehmood vs. The State*** **(2022 SCMR 1882)** and it was held that:

> **This section is divisible in two parts. In the first part, discretion is given to the Court and enables it at any stage of an inquiry, trial or other proceedings under the Code, (a) to summon anyone as a witness, or (b) to examine any person present in the Court, or (c) to recall and re-examine any person whose evidence had already been recorded. On the other hand, the second part appears to be mandatory and requires the Court to take any of the steps mentioned above if the new evidence appears to it essential to the just decision of the case. The object of the provision, as a whole, is to do justice not only from the point of view of the accused and the prosecution but also justice from the point of view of the society. The Court examines evidence under this section neither to help the prosecution nor to help the accused. It is done neither to fill up any gaps in the prosecution evidence nor to give it any unfair advantage against the accused. Fundamental thing to be seen is whether the Court considers this evidence necessary in the facts and circumstances of the particular case before it. If this results in only "filling of lacuna" that is purely a subsidiary factor and cannot be taken into consideration. There is no bar that a witness, whose statement under section 161, Cr.P.C. had not been recorded at the time of investigation, cannot be allowed to examine under section 540, Cr.P.C.**

Moreover, the role of the Court under section 540 Cr.P.C has been particularized by the apex Court in the case where the prosecution has dropped material

witness from being examined, in the case of ***Chairman, NAB vs. Muhammad Usman and others*** (**PLD 2018 SC 28**) when it was observed that:

> **There may be very rare and exceptional cases, where, the prosecution has dropped any material witness whose evidence, if given, may have a direct bearing on the end result of the case, in that event, the Court is blessed with unfettered powers to summon and examine such witness only for the purpose of discovery of truth, for the purpose of doing complete justice however, such powers are not to be exercised at random and without application of proper judicial mind with reasonable depth to the facts of each case. Unmistakenly, in view of the provision of section 540, Cr.P.C. the witnesses are examined as 'court witnesses' and not for prosecution or defence, therefore, none of the parties to a case can claim such a right. These powers shall only be exercised to put justice into correct channels.**

This Court in the case of ***Zeshan vs. Manzoor Aman and another*** (**2017 P.Cr.L.J 294**) has held that the Court can summon a material witness even if his/her name does not appear in the column of witnesses of the challan, provided his/her evidence is deemed essential by the Trial Court for the right decision of the case. The power under section 540, Cr.P.C. can be exercised if the Court feels that the evidence of such a person is essential for the just decision of the case.

8. In the case before this Court the witness was neither dropped nor examined by the prosecution but in view of similarity in the names of HC Hayat Ullah

No.641 and FC Hayat Khan No. 797 the former was dropped in view of the statement of other marginal witness of the recovery memorandum however, the later was not examined whose statement is essential for just decision of the case. Thus, viewing the entire factual and legal aspect, in the light of precedents of the apex Court and of this Court, as expounded above, while exercising the power under section 540 Cr.P.C this appeal is allowed consequently, the impugned judgment is set aside and the case is remitted back to learned trial Court with directions to summon PW Hayat Khan No. 797, the carrier of the parcels containing the samples to FSL, and record his statement as prosecution witness by affording opportunity to defence counsel for his cross-examination. The learned trial Court shall thereafter re-examine the appellant under Section 342, Cr.P.C. and decide the case in accordance with law positively within a period of one month. The parties are directed to appear before the learned trial Court on 23.05.2024. Needless to mention that during this period the appellant shall be treated as under-trial prisoner.

Announced
Dt: 02.05.2024

JUDGE

Office 7/5/2024
Tajamul/CS* | S.B: Hon'ble Mr. Justice Muhammad Naeem Anwar
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