PESHAWAR HIGH COURT,
BANNU BENCH

FORM OF ORDER SHEET

Date of Order or proceedings	Order or with signature of Judge(s).
(1)	(2)
11.06.2024	**Cr. A No. 276-Bof 2023** **Present:** Muhammad Asghar Khan Ahmadzai Addl: A.G. for the State. *** **KAMRAN HAYAT MIANKHEL, J:-** The State-appellant being aggrieved by the judgment dated 28.11.2022 of the learned Sessions Judge/Judge Special Court, Lakki Marwat, delivered in criminal case No.39/ of 2020, by which Safiullah Khan alias Gura (respondents/accused) was acquitted of the charges under Section 9 (D) of CNSA, has filed this acquittal appeal. 2. The facts of the prosecution case, in brief, are that on 02.01.2020, the complainant Irfanullah Khan S.H.O, Police Station Gambila received information that accused /respondent was present near Kot Kashmir bridge, and was busy in selling 'charas' and to the customers. On this information, the SHO-complainant alongwith police party reached the spot and saw the present accused having in his hands a white plastic bag, however, on seeing the police party he tried to escape, but was overpowered. On checking the plastic bag, chars weighing 1020 grams was recovered. The accused was arrested and the complainant-SHO drafted 'Murasila' and sent the same to the Police Station for registration of the case against the appellant. The contents of Murasila were incorporated into FIR No.02, dated 02.04.2020 at

Police Station Gambila, Lakki Marwat.

3. After completion of investigation, complete challan was submitted against the respondent. Formal charge was framed against the respondent, to which he pleaded not guilty and claimed trial. The prosecution, in order to prove its case against the appellant, produced six (6) witnesses. After close of prosecution case, statement of appellant was recorded under section 342 Cr.P.C, wherein, he pleaded innocence and false implication, however, neither opted to appear as his own witness on oath or to produce evidence in his defence. The learned trail Court, after hearing the arguments of the learned counsel for the appellant and learned APP appearing on behalf of the State acquitted the accused/ respondent. Hence, this appeal.

4. Arguments of learned Addl: A.G representing the State heard and record perused.

5. Perusal of record reveals that the complainant Irfanullah Khan S.H.O, during gasht received information that accused/ respondent is busy in selling the narcotics, on this information he along with police nafri proceeded to the spot and arrested the accused having a plastic bag in his hands, and on search from the said plastic bag 1020 grams chars was recovered. But astonishingly, no scale & bots, sachets of chars, or sale produce recovered from his possession, despite the allegation of selling narcotics, even no test purchase was made to ascertain actually he was busy in selling the narcotics, so much so, it has been admitted that at the time of arrest no customer was present with him. The

entire evidence is silent about this fact, hence, the prosecution failed to prove the allegation of selling of narcotics. Waheed Ullah SI, appeared as PW-02, he stated that on receipt of copy of F.I.R he along with policy officials proceeded to the spot, where the complainant Irfanullah Khan S.H.O, handed over to him the accused along with card of arrest and recovered contraband chars, which he sealed into parcels. And on return he handed over the case property to the moharrir Sajjad Khan IHC, (PW-05) of the Police Station for safe custody of the case property and for onward transmission to the F.S.L. The moharrir Sajjad Khan IHC (PW-05) in his statement, stated that after receiving case property and sample from the IO, he made entry in the register No. 19, and kept the same in the malkhana and later on vide raseed No. 17/21, he sent the sample to F.S.L Peshawar, through Hukamzad FC No. 432. Hukam Zad FC No. 432 was examined as PW-04, he in his statement stated that the moharrir handed over to him the case sample on 15.01.2020 for onward transmission to the F.S.L Peshawar. The sample was sent to the F.S.L with the delay of fourteen days, in violation of Rule 4 (2) of Narcotic Substances Analyst Rules 2001, to which the prosecution has not given any plausible explanation, which aspect of the case has cast serious doubt on the prosecution case as to its accuracy.

6. Moreover, the sample was handed over to the constable Hukamzad FC No. 432 PW-04, on 15.01.2020, but he produced the same to the F.S.L Peshawar on 16.01.2020, when he was questioned that why the sample was received to the F.S.L on

16.01.2020, instead of 15.01.2020, his answer was that due to rush at the laboratory, he was unable to deposit the same in time. Such explanation does not appeal to prudent mind and seems to be a vague excuse and cost a serious dent with respect to safe custody of the sample during the period. The whole case of the prosecution rests on the recovery of contraband and its safe transmission from the spot to the police station and from the police station to the FSL. The prosecution failed to establish chain of safe custody of narcotics. Reliance in this regard is placed on Criminal Appeal No. 184 to 2020 decided on 06th January 2021 reported as 2021 SCMR 451, which held as under;

> ***"The chain of custody or safe custody and safe transmission of narcotic drug begins with seizure of the narcotic drug by the law enforcement officer, followed by reparation of representative samples of the seized narcotic drug, storage of the representative samples and the narcotics drug with the law enforcement agency and then dispatch of the representative samples of the narcotics drugs to the office chemical examination for examination and testing. This chain of custody must be safe and secure. This is because, the report of the chemical examination enjoys critical importance under CNSA and the chain of custody ensure that correct representative samples reach the office of the chemical examiner. Any break or gap in the chain of custody i.e. in the safe custody or safe transmission of the narcotic drug or its***

representative samples makes the report of the chemical examiner unsafe and unreliable for justifying conviction of the accused. The prosecution, therefore, has to establish that the chain of custody has been unbroken and is safe, secure and indisputable on the report of chemical examiner".

7. Now coming to the FSL Ex:PK that whether the same fulfills the requirement of Rule 6 of the (Government Analysts) Rules, 2001 or otherwise. On perusal of the F.S.L report it transpired that test protocols that were applied to carry out the test were missing, therefore, the mandatory requirement of law provided by Rule 6 has not been complied with in its letter and spirit. The non-compliance of the ibid Rule would render the said report inconclusive, suspicious and untrustworthy and the same could not be relied upon. In this respect reliance is placed on the judgment reported as ***2021 YLR 1613 (Peshawar)***, wherein it was held that:-

"6. The Report of the Government Analyst in this case specifies only the tests applied and not the protocols thereof. The term "protocol" has not been defined in the Rules. Its dictionary meaning is: "A plan of scientific experiment or other procedure.4" It is also referred to as "the precise method for carrying out or reproducing a given experiments." These definitions are in line with the elaboration of the term "protocol" given in Imam

Bakhsh wherein the Court stated the expression "protocol" to mean an explicit plan of an experiment, procedure or test. It is clarified that. "protocol" is, therefore, a recognized standard method or plan for carrying' out the test applied to ascertain the nature of the substance under examination. No test can take place without a protocol. The Report of the Government Analyst must show that the test applied was in accordance with a recognized standard protocol. Any test conducted without a protocol loses its reliability and evidentiary value. Therefore, to serve the purposes of the Act and the Rules, the Report of the Government Analyst must contain (i) the tests applied (ii) the protocols applied to carry out these tests (iii) the result of the test(s). This sequence, for clarity and better understanding can be envisaged as follows:

8. For the above discussed reasons, this court has no hesitation to hold that on one hand the prosecution failed to send the samples to the F.S.L within due time or to prove safe custody, and on the other the Report of the Government Analyst in the instant case does not specify the protocols of the tests applied and it does not meet the requirements of the law. Therefore, this court is of the firm opinion that the prosecution has miserably failed to prove its case against the convict/respondent beyond reasonable doubt. while there is no cavil to the proposition that responsibility to prove its case is squarely rested upon shoulders of the

prosecution, which has not been discharged successfully in this case and it is settled law that benefit of a reasonable doubt is to be extended to accused and that only a single reasonable doubt qua the guilt of accused is sufficient to acquit him of the charge. Reliance in this respect may be placed on the judgment delivered by Hon'ble Supreme Court of Pakistan in the case of ***"Ghulam Qadir Vs. The State"*** reported as ***2008 SCMR 1221*** where it has been held as under: -

> ***"It needs no reiteration that for the purpose of giving benefit of doubt to an accused person, more than one infirmity is not required, a single infirmity crating reasonable doubt in the mind of a reasonable and prudent mind regarding the truth of charge-makers the whole case doubtful. Merely because the burden is on accused to prove his innocence it does not absolve the prosecution to prove its case against the accused beyond any shadow of doubt in this duty does not change or vary in the case."***

9. Even otherwise, the principles for appreciation of evidence in appeal against acquittal are now well settled. If an accused is presumed to be innocent and after trial, he is acquitted, he earns double presumption of innocence and acquittal judgment or order normally does not call for any interference, unless it is found arbitrary, capricious, fanciful, artificial, shocking and ridiculous and while evaluating the evidence, difference is to be maintained in an appeal from conviction and an acquittal appeal and in the latter

case the interference is to be made only when there is non-reading and gross mis-reading of the evidence, resulting into miscarriage of justice and on perusal of the evidence no other decision can be given except that the accused is guilty. Reliance in this context is placed on the case ***of "Yar Muhammad & 03 others Vs. The State"*** reported as ***1992 SCMR 96*** where the Hon'ble Apex Court has observed as under-

> ***"Unless the judgment of trial Court is perverse, completely illegal and on perusal of evidence no other decision can be given except that the accused is guilty or there has been complete misreading of evidence leading to miscarriage of justice, High Court will not exercise jurisdiction under section 417, Cr.P.C." It was further held that "in exercising this jurisdiction, High Court is always slow unless it feels that gross injustice has been done in the administration of criminal justice".***

10. For what has been discussed hereinabove, this appeal, being bereft of any merit, is hereby dismissed in limine.

Announced:

Dt: 14.06.2024
Azam/P.S

JUDGE

JUDGE

(D.B)
Hon'ble Mr. Justice Kamran Hayat Miankhel
and Hon'ble Mr. Justice Dr. Khurshid Iqbal

27/6/2024

28 JUN 2024