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

Cr.A No. 276-M/2022

(Mehboob Ali *Versus* The State and another)

Present:

Mr. Hamza Nawab, Advocate for appellant/convict.

Mr. Raza Uddin Khan, A.A.G. for State.

Date of hearing: **27.02.2023**

JUDGMENT

MUHAMMAD NAEEM ANWAR, J.- Through this single judgment, I intend to decide instant appeal **Cr.A No. 276-M/2022** titled *"Mehboob Ali Vs. The State and another"* as well as connected **Cr.A No. 300-M/2022** titled *"Rafayun Vs. The State and another"*, as both these appeals are emanating from the same judgment dated 27.09.2022 of the learned Additional Sessions Judge-VI/Judge Special Court, Swat rendered in case FIR No. 1114 dated 14.07.2021 u/s 9(d) & 11(c) of the Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019 registered at P.S Mingora, District Swat, wherein both the appellants were convicted and sentenced as under:

I) **Mehboob Ali**

Rigorous imprisonment for 08 years u/s 9(d) of the KP CNSA with fine of Rs.500,000/- or to undergo further 03 months R.I in case of default thereof.

II) **Rafayun**

Rigorous imprisonment for 01 year with fine of Rs.100,000/-, in case of default he was directed to undergo further 01-month R.I.

Benefit of section 382-B, Cr.P.C was extended to both the convicts.

2. Precise facts of the case are that complainant Shah Said (PW-3), while present in front of vegetable market *(Sabzi Mandi)* Mingora on 14.07.2021, received spy information that a motorcar, having three persons onboard and containing huge quantity of narcotics, had been parked on the roadside *Raja Abad* near *Janazgah*. Consequent upon the tipoff, complainant picked up with him Fahim Khan ASI (PW-5) and other police officials present in People Chowk on patrol duty and rushed to the spot. On arrival there, police found the motorcar having been parked on the right side of road wherein appellants Mehboob Ali and Rafayun had occupied the driver seat and front passenger seats respectively whereas their co-accused Sohail Khan (acquitted) was sitting on the rear seat of the motorcar from which they were deboarded. During body search of appellant Mehboob Ali, a holster around his waist was recovered from him which contained 30 bore pistol bearing No. R7178 with spare magazine and 25 rounds whereas Methamphetamine (Ice) was recovered from his right side pocket. Similarly, a plastic bag containing Ice was recovered from the right-side pocket of

appellant Rafayun during his body search. During search of the motorcar, a sack of flour of white colour, containing 08 packets of chars wrapped with yellow tape, was recovered from the recessed area of stepney inside the trunk. When separately weighed through a digital scale, the Ice recovered from possession of appellant Mehboob Ali came out of 750 grams whereas weight of the Ice recovered from appellant Rafayun became known as 783 grams. The packets of chars were found of 1017, 1050, 1047, 1014, 1028, 1030, 1019 and 1026 total 8231 grams. Appellant Mehboob Ali could not produce license regarding the pistol, which was sealed in Parcel No.1. Samples of 01 gram each from the recovered Ice whereas samples of 05 grams each were separated from the packets of chars and sealed in Parcels No. 02 to 11. The remaining Ice 749 grams were sealed in Parcel No.12, the remaining Ice 782 grams were sealed in Parcel No.13 whereas the remaining chars weighing 8191 grams containing 08 packets were sealed in Parcel No. 14. The motorcar was also taken into possession and joint recovery memo in respect of the aforesaid recoveries was prepared on the spot. The appellants and their co-accused were arrested and the case was reported against them through *Murasila* which was sent through ASI Fahim Khan (PW-5) to P.S

Mingora, where FIR (Ex.PW-2/1) was registered against all the accused.

3. After completion of investigation, complete challan was submitted before the Court for trial of the appellants and their co-accused. Formal charge was framed against them to which they did not plead guilty and claimed trial. In order to substantiate the allegations against the accused, prosecution produced and examined 08 witnesses and closed the evidence. Thereafter, statements of the accused were recorded u/s 342, Cr.P.C wherein they pleaded innocence and claimed to have been charged in a false case, however, they neither recorded their own statements on oath in terms of section 340(2), Cr.P.C nor produced any witness in their defence. On conclusion of trial, the learned trial Court vide impugned judgment acquitted co-accused Sohail Khan whereas convicted and sentenced the present appellants, the detail of which has already been given in the earlier portion of this judgment, hence, these appeals.

4. Arguments heard and record perused.

5. The case of prosecution against the present appellants is that police have recovered total 8231 grams of chars containing eight packets from the trunk of an unregistered/non-custom paid (NCP) motorcar wherein

appellant Mehboob Ali was seated on the driving seat at the time of recovery whereas 750 grams of Ice were recovered from his right-side pocket. Complainant has also claimed recovery of 783 grams of Ice from the pocket of appellant Rafayun who was seated in the front seat of the car. As per prosecution version, the samples of 01 gram each from the recovered Ice were sealed in Parcel Nos. 2 & 3 whereas samples of 05 grams each separated from the packets of chars were sealed in Parcel Nos. 4 to 11, as such, total 10 parcels were sent to FSL for chemical analysis. The FSL report in this regard is available on record as Ex.PW-7/10 which is positive for Ice and chars qua the samples in the respective parcels. It is by now settled law that in narcotics cases, conviction of an accused cannot be based only on the matching FSL report unless and until the chain of safe custody and safe transmission of the samples of recovered contraband right from the time of recovery till delivery thereof in the Forensic Lab is established. The completeness of this chain of custody is of utmost importance and any break therein or lapse in the control of possession of the samples would be sufficient to create a doubt regarding safe custody and safe transmission of the samples. In such eventuality, reliability of the positive FSL report qua the samples loses its value and

cannot be relied upon for conviction of accused. The significance of the chain of safe custody and secured transmission of the samples has been highlighted by Hon'ble Supreme Court in a number of cases. In the case titled ***"The State through Regional Director ANF V/s. Imam Bakhsh and others"*** **(2018 SCMR 2039)** the Hon'ble apex Court observed that the chain of custody begins with the recovery of the seized drug by the Police and includes the separation of the representative sample(s) of the seized drug and their dispatch to the Narcotics Testing Laboratory; this chain of custody is pivotal as the entire construct of the Act and the Rules rests on the Report of the Government Analyst, which in turn rests on the process of sampling and its safe and secure custody and transmission to the laboratory. Thus, the rule laid down by the Hon'ble apex Court in this regard is that the prosecution is bound to establish that the chain of custody of the samples was unbroken, unsuspicious, indubitable, safe and secure. Whether that onus has been discharged by prosecution in the present case in accordance with the aforesaid settled principle or not, is the first question which needs resolution by this Court in light of the evidence available on record.

6. I have carefully gone through the statements of the Seizing Officer namely Shah Said ASHO (PW-3) and other prosecution witnesses but none of them have explained in their examination-in-chief that who had brought the samples to police station and when and to whom the same were handed over for safe custody. The record shows that ASI Fahim Khan (PW-5) had taken only *Murasila*, card of arrest and recovery memo to police station but his statement is silent regarding the case property rather ASI Afzal Hussain (PW-2), to whom the above documents were handed over by PW-5, frankly admitted that alongwith *Murasila* neither case property nor the accused had been produced before him. Constable Farman Ali (PW-6), who is carrier of the samples to FSL, in response to a question in his cross-examination, stated that the parcels were lying with Moharrir in his office. Madad Moharrir Barkat Ali appeared in the witness box as PW-8 and recorded his statement only to the extent of handing over the samples to constable Farman Ali and did not utter a single word in his examination-in-chief that the samples had been given to him by Seizing Officer for safe custody. He stated in his cross-examination that he had collected the parcels from *Malkhana* but admitted that he was not incharge of *Malkhana* meaning thereby that the

samples had not been entrusted to him for safe custody. Thus, if it be presumed that the samples had been kept in *Malkhana* even then it is shrouded in mystery that who was responsible for safe custody of the samples. Obviously, neither name of the Muharrir or incharge of the *Malkhana*, to whom the samples had been handed over, can be ascertained from the entire record nor prosecution has examined him before the trial Court for confirmation of safe custody of the samples. Even neither copy of the relevant page of Register No.19 is available on record nor original thereof was produced before the Court to prove that the case property had ever been kept in *Malkhana*. Hence, the chain of safe custody of samples since the time of separation thereof from the contraband on 14.07.2021 till handing over the same to carrier (PW-6) on 15.07.2021 is broken which has vitiated reliability and conclusiveness of the FSL report. Further guidance is sought from ***"Zafar Khan and another Vs. State"*** **(PLJ 2022 SC (Cr.C.) 131),** ***"Abdul Ghani and others Vs. The State and others"*** **(2019 SCMR 608)** and ***"Usman Shah Vs. The State"*** **(2022 YLR 821 Peshawar).**

7. Another glaring disparity in the present case is emerging from the number of parcels containing the samples sent to the Forensic Lab. According to FIR,

recovery memo and transit receipt (Ex.PW-8/1), which was placed on file through an application after 16 months of the delivery of samples, total 10 parcels had been prepared regarding the samples on the spot; two pertaining to Ice while Parcel Nos. 4 to 11 were containing the samples of 08 packets of chars but it is astonishing that constable Farman Ali (PW-6) had carried only 04 parcels to FSL. The first few lines of his examination-in-chief are worth perusal.

> "Stated that on 15.07.2021 Bakht Ali (Barkat Ali) Muharrir Investigation of Police Station Mingora handed over me **four parcels** containing 05/05-gram chars and 01/01 ICE along with copy of FIR, application alongwith transit receipt for taking the same to FSL Laboratory".
> ***(Emphasis supplied and the name in parenthesis added)***

In cross-examination he further clarified the number of parcels he had carried to FSL by replying the questions that:

> "**Moharrir of the PS handed over to me only four parcels at 08:30 a.m**. These parcels were given to me in shopping bag. Self-stated these **four parcels** were wrapped in white clothes affixed with seals..... **The four parcels were lying with the Moharrir in his office room** i.e., Roznam Cha office, wherein he handed over the same to me".
> ***(Emphasis supplied)***

It is copiously clear from the above statement of PW-6 that he had taken only four parcels containing samples of the recovered contraband whereas the report has been received about 10 samples. The mentioned

disparity floating on the surface of record creates a serious doubt regarding genuineness of the samples and FSL report more particularly when the transit receipt was placed on file at a belated stage without any plausible reason. It is also reflected from record that application to Chemical Examiner of the Forensic Laboratory was moved by Seizing Officer though it was not his job at all when he had already parted with the case after making pointation of the place of recovery to I.O. When confronted with the application, the Seizing Officer stated that he had forwarded the application to FSL with his signature. The application, available at Page 124 of the record, bears the words تفتیشی آفیسر at the foot, therefore, only the Investigating Officer was authorized to forward the application with his own signature and the Seizing Officer had nothing to do with it as he had already completed his job.

8. The record further shows that body search of the appellants and their acquitted co-accused was conducted by the Seizing Officer on the spot and except recovery of Ice from the pockets of the present appellants, nothing else was shown recovered from their possession. He stated in his examination that during body search of the accused, he had never recovered any wallet, mobiles or cash from their

possession, therefore, did not mention the same in the recovery memo. The record shows that appellant Mehboob Ali belongs to Tehsil Matta whereas the remaining two accused Rafayun and Sohail Khan hail from Peshawar. Two accused had travelled to District Swat from far off area i.e., Peshawar whereas appellant Mehboob Ali though hailed from Swat but his abode was in Teshsil Matta away from Mingora. It is beyond comprehension that they were not carrying a single penny with them though staying far away from their homes and their routine transactions with shops, hotels, petrol/CNG pumps etc. were dependent on cash payment. The above version of the Seizing Officer regarding non-recovery of cash from the appellants and their co-accused raises the eyebrow. A suggestion was put to him regarding recovery of Rs.28,000/- from one of the appellants, which he refuted. His falsity becomes apparent supposedly at subsequent stage after shifting the accused to Police Station when their body search was again conducted and recovery of two mobile sets with driving license from appellant Mehboob Ali, one mobile set from appellant Refayun whereas recovery of two mobile sets were shown from acquitted co-accused Sohail Khan through recovery memo Ex.PW-4/1. It is pertinent to mention here that SIM numbers found inside the mobile phones of the accused

have duly been mentioned in the heading of *Murasila* as well as in their card of arrest prepared on the spot as per Seizing Officer. When no mobile phone, as per statement of the Seizing Officer, had been recovered from the accused on the spot from what source he had confirmed their SIM numbers and entered the same in *Murasila* and card of arrest there and then. This situation leads this Court to the conclusion that *Murasila*, card of arrest and recovery memos had been prepared in the police station, as such, on the same ratio the status of the subsequent proceedings of investigation has also become doubtful. It is settled law that slightest doubt, which occurs in prosecution case is sufficient to acquit accused. It has been held by superior Court umpteenth times that for extending benefit of doubt, it is not necessary that there should be many circumstances creating doubts rather a single circumstance, creating reasonable doubt in prudent mind about guilt of accused makes him entitled to its benefit, not as a matter of grace or concession but as a matter of right. **Rel: *"Mst. Asia Bibi Vs. The State and others"* (PLD 2019 S.C 64), *"Tariq Pervaiz Vs. The State"* (1995 SCMR 1345) and *"Ayub Masih Vs. The State"* PLD 2002 SC 1048".**

9. In addition to the above-mentioned legal infirmities in handling the samples and process of

investigation, important witnesses of prosecution have not supported each other in their respective statements on material particulars of the recovery in light whereof various doubts arise regarding the mode and manner of recovery of narcotics as reported in the present case. It is the version of Seizing Officer in FIR that he had received spy information with regard to suspected motorcar near *Janazgaah* when he was present in front of vegetables/ fruits market from where he rushed towards the spot by picking up ASI Fahim Khan and other police officials from People Chowk but ASI Fahim Khan (PW-5) stated in cross-examination that he had met the Seizing Officer near fruits Market. In *Murasila*/FIR, appellant Mehboob Ali was shown on driving seat of the motorcar, appellant Rafayun on the front seat whereas acquitted co-accused Sohail Khan was mentioned seated in the rear seat but Seizing Officer stated that Rafayun was on the rear seat of motorcar. When confronted with non-mentioning of the mobile Datsun as well as driver and gunner Altaf Hussain in the site plan, Seizing Officer stated that he had left the mobile van at some distance whereas driver and gunner were present there for security of the official vehicle. ASI Fahim Khan narrated some other story in his cross examination that on their arrival to spot, the Seizing

Officer touched the motorcar; opened the door thereof and by that time they also deboarded from the mobile Datsun meaning thereby that the vehicle had been taken to the spot but same was not shown in the site plan nor the driver and gunner were given any point. It was noted in *Murasila* and site plan that the motorcar, from which the contraband was recovered, had no registration number and similar statement was recorded by Seizing Officer but Fahim Khan ASI belied him by stating that the motorcar was having registration No. AE-1226. According to contents of *Murasila*, the chars had been recovered from a white color sack but the sack produced before the Court was found green in colour. Fahim Khan ASI, while carrying *Murasila* from the spot, had reached the P.S at 09:45 hours whereas Seizing Officer had shown his arrival to P.S from the spot at 09:25 hours. Arrival of the Seizing Officer to P.S prior from ASI Fahim Khan, entrusted with the duty of carrying Murasila, is an irrational and illogical phenomenon appearing in the present case. While replying another question, the Seizing Officer, in utter disagreement with his earlier version, stated that he had reached the P.S after 02 hours and 30 minutes after departure of Fahim Khan ASI. If the latter version of the Seizing Officer be accepted as true, his first arrival to P.S from the spot was 12:30

hours but his that version is also belied by his subsequent version according to which he had showed the time of his departure with I.O for spot pointation as 10:40 hours. Similar contradictions are visible in the statements of Seizing Officer and I.O qua the times of their joint departure from the P.S to Spot for pointation and their arrival back to P.S. The Seizing Officer stated that he and I.O had proceeded to the spot alone but on the other hand stated that I.O had recorded statements of investigation staff on the spot which fact was negated by I.O by stating that he had examined no one during the spot inspection. Similar variations can be found in the statement of Seizing Officer, Fahim Khan ASI and contents of *Murasila* regarding the mode and manner of deboarding and conducting body search of the accused and direction of the motorcar of the accused at the relevant time. Fahim Khan ASI was confronted with his statement u/s 161, Cr.P.C wherein he had mentioned the kind of contraband as heroin though narcotic of the same nature does not appear in the recovery memo and FIR. The kind of motorcar has been mentioned 'G' in the first paragraph of site plan but thereafter two times it was mentioned as 'X'. The above contradictions in the statements of PWs suggest that a concocted story was structured against the appellants. No

doubt, it is settled principle of law that minor contradictions in the statements of witnesses do creep with passage of time and can be ignored for safe administration of justice, however, disagreement of the PWs in their deposition on almost each and every fact of the occurrence can be considered for testing their credibility and integrity. In the present case, not only the Seizing Officer has recorded a self-contradictory statement but most of his assertions have not been confirmed by the remaining PWs. Thus, the statements recorded by the witnesses in the present case neither ring true nor appear to be natural, hence, cannot be considered for conviction of the appellant.

10. Summing up the above discussion, the prosecution case is suffering from inherent infirmities and inconsistency of very glaring nature creating serious doubts in mind regarding the guilt of appellants. The learned trial Court has convicted both the appellants by taking into consideration only the contents of FIR and recovery memo without touching the remaining contradictory and inconsistent statements of the prosecution witnesses. Trial is a structured process where the facts of a case are presented before the Court in support of which witnesses are produced and examined by

prosecution. It is the duty of trial Judge to analyse the facts of the case so presented in juxtaposition with the statements of witnesses. Any conclusion drawn by trial Court only on the basis of facts without proper appraisal of evidence on record is a wrong approach against the settled principles for administration of justice. The impugned judgment is result of non-reading of evidence on record, hence, needs reversal in the circumstances. Resultantly, instant appeal Cr.A No. 276-M/2022 as well as the connected Cr.A No. 300-M/ 2022 are allowed, the impugned judgment to the extent of conviction and sentences of appellants Meboob Ali and Rafayun is set aside and they are acquitted of the charge levelled against them in the present case. They be released forthwith from jail, if not already released, provided their detention in jail is no more required in connection with some other case.

11. Above are the reasons of my short orders of the even date in the instant and connected Cr.A No. 300-M/2022.

Announced
Dt: 27.02.2023

JUDGE

Office 3/3/2023 WK